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FEDERAL STATUTES

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ANNOTATED

NOTES ON THE

CONSTITUTION OF THE UNITED STATES

BY

THOMAS H. CALVERT

COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. MCKINNEY

VOL. IX.

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FEDERAL STATUTES, ANNOTATED.

NOTES ON THE CONSTITUTION.

ARTICLE II., SECTION 1.

"The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows."

Represented by Heads of Departments.—The President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts.

Wilcox v. Jackson, (1839) 13 Pet. (U. S.) 498, 513; *Runkle v. U. S.*, (1887) 122 U. S. 557. See also *Wolsey v. Chapman*, (1879) 101 U. S. 755; *U. S. v. Farden*, (1878) 99 U. S. 10; *Confiscation Cases*, (1873) 20 Wall. (U. S.) 92; *Williams v. U. S.*, (1843) 1 How. (U. S.) 297; *U. S. v. Eliason*, (1842) 16 Pet. (U. S.) 291; *Relation of President to Executive Departments*, (1863) 10 Op. Atty-Gen. 527.

Where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it is equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy. *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 165, wherein the court, *per* Marshall, C. J., said: "By the Constitution of the United States, the President is invested with certain

important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that Act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties, when he is directed peremptorily to perform

certain acts, when the rights of individuals are dependent on the performance of those acts, he is so far, the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion sport away the vested rights of others."

As a general rule the direction of the President is to be presumed in all instructions and orders issued from the competent department. Official instructions issued by the heads of the several executive departments, civil and military, within their respective jurisdiction, are valid and lawful without containing express reference to the direction of the President. Relation of President to Executive Departments, (1855) 7 Op. Atty-Gen. 453.

The secretary of the navy represents the President and exercises his power on the sub-

jects confided to his department. *U. S. v. Jones*, (1855) 18 How. (U. S.) 95.

An order dismissing an officer in the marine corps, issued by the secretary of the navy as such, not purporting to be the act or by direction of the President, is nevertheless in legal effect the order of the President. *McElrath's Case*, (1876) 12 Ct. Cl. 202.

The action of the commissioner of Indian affairs must be presumed to be the action of the President, according to the well-settled principle adopted in practice and recognized by the courts, that the President acts in the performance of most of his duties through an appropriate department of the government and through the chief officers charged with the immediate supervision of the affairs of that department. *Belt's Case*, (1879) 15 Ct. Cl. 107.

Approval of Court-martial Proceedings.—A certificate of the secretary of war, in the following form: "War Department, July 24, 1872. In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial in the foregoing case have been forwarded to the Secretary of War for the action of the President. The proceedings, findings, and sentence are approved, and the sentence will be duly executed. Wm. W. Belknap, Secretary of War," was held to be a sufficient authentication of the judgment of the President.

U. S. v. Fletcher, (1893) 148 U. S. 86, wherein the court said: "The views of the judge advocate general, and the action of the secretary in 1888 upon a reference of the subject in answer to the petition of Captain Fletcher, presented to the President, March 27 of that year, were induced by the case of *Runkle v. U. S.*, (1887) 122 U. S. 543, and the present decision of the Court of Claims was based upon it. Reference to the report of that case shows that the circumstances were so exceptional as to render it hardly a safe precedent in any other. It appeared therein that the proceedings, findings, and sentence of the court-martial were transmitted to the secretary of war, who on Jan. 16, 1873, wrote upon the record an order approving the proceedings, with certain exceptions, and the findings and sentence, together with the further statement that in view of the unanimous recommendation by the members of the court that the accused should receive executive clemency, and other facts, the President was pleased to remit all of the sentence except so much as directed cashiering; and that, thereupon, the secretary issued a general order announcing the sentence, as thus modified. It further appeared that thereafter, and on the same

day, Major Runkle presented to President Grant a petition insisting that the proceedings had not been approved by him as required by law; that the conviction was unjust; that the record was insufficient to warrant the issuing of the order, and asking its revocation and annulment; whereupon, in pursuance of the petition, the record of the official action theretofore had was, by direction of the President, referred to the judge advocate general for review and report; that this report was subsequently made, and with the petition was found by President Hayes awaiting further and final action thereon, and being taken up by him as unfinished business, the conviction and sentence were disapproved, and the order of Jan. 16, 1873, revoked. This court was of opinion that the order was capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised, and that under the circumstances, which are recapitulated, it could not be said that it positively and distinctly appeared that the proceedings had ever, in fact, been approved or confirmed by the President as required by the articles of war." See also *In re Chapman*, (1897) 166 U. S. 670.

Protecting Citizens Abroad.—The duty of protecting the lives or property of citizens abroad rests in the discretion of the President. Acts of lawless violence or of threatened violence to a citizen or his property cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. In all cases where

a public act or order rests in executive discretion, neither he nor his authorized agent is personally civilly responsible for the consequences.

Durand v. Hollins, (1860) 4 Blatchf. (U. S.) 451, 8 Fed. Cas. No. 4,186.

The righting a wrong that may be done in foreign lands is a political duty and appertains to the legislative and executive departments of the government, because it involves the relations of the United States with foreign

nations; and the performance of that duty in its incipient stage necessitates negotiation which is exclusively the function of the executive department, and the court has no jurisdiction to coerce the action of the executive. *U. S. v. Hay*, (1902) 20 App. Cas. (D. C.) 580.

Authority to Remove Prisoner.— The President, by virtue of his office and without authority given by some statute, has no power to remove a convict from one prison to another; and the removal of a convict, sentenced to prison by a consular court of the United States, to this country for imprisonment and to serve out his sentence, would be unlawful.

Convicts of Consular Courts, (1889) 19 Op. Atty.-Gen. 377.

Control Landing of Foreign Cables.— The President has the power, in the absence of legislation by Congress, to control the landing of foreign submarine cables on the shores of the United States. He may either prevent the landing, if the rights intrusted to his care so demand, or permit it on conditions which will protect the interests of this government and its citizens. If the landing has been effected without the consent or against the protest of this government, respect for its rights and compliance with its terms may be enforced by applying the prohibition to the operation of the line unless the necessary conditions are accepted and observed. No one has a right to land a foreign cable upon our shores and establish a physical connection between our territory and that of a foreign state without the consent of the government of the United States.

Foreign Cables, (1898) 22 Op. Atty.-Gen. 13. See also *Cuba — Cables*, (1899) 22 Op. Atty.-Gen. 408.

The grounding of a cable upon the island of Cuba to connect it with a foreign country cannot be done and maintained in opposition to the law of the government which exercises sovereign power in the island. The

authorities of the United States have full power, in their discretion, to prevent by all necessary means the grounding of a cable intended to connect the island of Cuba with the United States or any other country, or to remove or disrupt any cable which may be laid in disregard of its instructions and against its will. *Cuba — Cables*, (1899) 22 Op. Atty.-Gen. 514.

Authority to Approve Erection of Bridge Across Niagara River.— In the absence of any Act of Congress or constitutional provision conferring upon him authority so to do, the President cannot officially consent to and approve the erection of a proposed bridge across the Niagara river.

Bridge Across Niagara River, (1883) 17 Op. Atty.-Gen. 523.

ARTICLE II., SECTION 1.

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.¹ The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them. Before he enter on the execution of his office, he shall take the following oath or affirmation:— 'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.'"

¹ As to the manner of electing the President and Vice-President, see the substituted provisions contained in the Twelfth Amendment.

Electors Are Not Officers of United States.—The sole function of the Presidential electors is to cast, certify, and transmit the vote of the state for President and Vice-President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in Congress.

In re Green, (1890) 134 U. S. 379. See also *Todd v. Johnson*, (1896) 99 Ky. 548, and *Mason v. State*, (1892) 55 Ark. 529, as to jurisdiction of the crime of destroying ballot-box and ballots.

The franchise or privilege of the office of elector originates in the Constitution and laws of the United States and not in those of the state. *State v. Bowen*, (1876) 8 S. Car. 400.

Discretion of State as to Manner of Appointing Electors.—It is competent for a state legislature to provide for the election of an elector and an alternate elector in each of the congressional districts into which the state is divided, and of an elector and an alternate elector at large in each of two districts defined by the statute. The clause of the Constitution does not read that the people or the citizens shall appoint, but that "each state shall;" and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.

McPherson v. Blacker, (1902) 146 U. S. 25, wherein the court said that reference to contemporaneous and subsequent action under this clause shows "that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as notably by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the state to appoint in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an

amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some states might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable." *Affirming* (1892) 92 Mich. 377.

State law is passed in pursuance of Constitution.—When the legislature of a state, in obedience to this provision, has by law directed the manner of appointment of the electors, that law has authority solely from the Constitution of the United States. It is a law passed in pursuance of the Constitution. *Electoral College's Case*, (1876) 1 Hughes (U. S.) 571, 8 Fed. Cas. No. 4,336.

Holding an Office of Trust or Profit under the United States.—A member of the United States centennial commission held an office of trust under the United States, and was therefore disqualified for the office of elector.

In re Corliss, (1876) 11 R. I. 640.

Matters Within Control of Congress.—Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be on the same day throughout the United States, but otherwise the power and jurisdiction of the state is exclusive, with the excep-

tion of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and federal influence might be excluded.

McPherson v. Blacker, (1902) 146 U. S. 35, *affirming* (1892) 92 Mich. 377.

Tax on Salary of President. — A specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him, which, in the case of the President, would be prohibited by the Constitution of the United States if the Act of Congress levying the tax were passed during the official term of the President.

President and Judges — Tax on Salaries of, (1869) 13 Op. Atty.-Gen. 162.

ARTICLE II., SECTION 2.

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."

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I. RELATION TO AUTHORITY OF BRITISH CROWN.—"In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."

Fleming v. Page, (1850) 9 How. (U. S.) 618.

Federalist.—The President is to be the commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme

command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all of which, by the Constitution under consideration, would appertain to the legislature. Hamilton, in *The Federalist*, No. LXIX.

II. POWER TO ESTABLISH ARMY REGULATIONS. — The power of the executive to establish rules and regulations for the government of the army is undoubted. The power to establish implies, necessarily, the power to modify or repeal, or create anew. The secretary of war is the regular constitutional organ of the President for the administration of the military establishment of the nation: and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such are binding upon all within the sphere of his legal and constitutional authority.

U. S. v. Eliason, (1842) 16 Pet. (U. S.) 302. See also Kurtz v. Moffitt, (1885) 115 U. S. 503.

But this power is limited and does not extend to the repeal or contradiction of existing

statutes, nor to the making of provisions of a legislative nature. Navy Regulations, (1853) 6 Op. Atty-Gen. 10: Power of President to Create a Militia Bureau in War Department, (1861) 10 Op. Atty-Gen. 14.

III. POWER OF CONGRESS TO LEGISLATE. — While the President is made commander-in-chief by the Constitution, Congress has the right to legislate for the army, not impairing his efficiency as such commander-in-chief, and when a law is passed for the regulation of the army, having that constitutional qualification, he becomes as to that law an executive officer, and is limited in the discharge of his duty by the statute.

McBlair v. U. S., (1884) 19 Ct. Cl. 541.

The constitutional power of the President to command the army and navy, and that of Congress "to make rules for the government and regulation of the land and naval forces," are distinct: Congress cannot by rules and regulations impair the authority of the President as commander-in-chief. Swaim v. U. S., (1893) 28 Ct. Cl. 173.

The power of command and control of the army the framers of the Constitution placed in the hands of the President, with only two restrictions set upon it: that Congress should have power "to make rules for the government and regulation of the land and naval forces;" that the appointment of officers should be "by and with the advice and consent of the Senate." Street v. U. S., (1889) 24 Ct. Cl. 247.

IV. REPRESENTED BY SUPERIOR OFFICER IN COMMAND. — Whatever the President of the United States, as commander-in-chief, might do if personally present, may be done by the superior officer in command of any district unless restrained by orders or by the peculiar nature of the service in which he is engaged.

Heffernan v. Porter, (1869) 6 Coldw. (Tenn.) 398.

V. EFFECT OF MILITARY OCCUPATION — 1. Extension of Territory and Operation of Laws. — The duty and power of the President are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

Flanning v. Page, (1850) 9 How. (U. S.) 415.

"It is true that in the case in which these observations are made, the point to be determined was, whether conquered territory, which

in the course of hostilities had come into our military possession, became a part of the United States, and subject to our general laws. But they are important to this case as defining the power of the President in war to be merely that of the military com-

mander-in-chief; that territory can be acquired only by the treaty-making and legislative authority, and, consequently, that the fact that hostilities are by the military authority directed against a particular portion of the enemy's territory, cannot be said to make the acquisition of that territory the object of the war." *U. S. v. Castillero*, (1862) 2 Black (U. S.) 358.

The right of the President temporarily to govern localities through his military officers he derives solely from the fact that he is the commander-in-chief of the army, and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war, a commanding general in the army of the United States could do it. Where the laws are, or may be, executed without the interference of the President, by his military, he has no right thus to interfere. *Griffin v. Wilcox*, (1863) 21 Ind. 382.

The military occupation by the United States of a conquered country confers no such rights either upon the government or the inhabitants of the occupied territory as attach to a conquest when it is made by the government of Great Britain. The territory passes under the control of the government of the United States, as against all other nations, but it does not, *ipso facto*, become a part of it; and its inhabitants are subject to the government of occupation, under the direction of the President of the United States as commander-in-chief of the army, or, in other words, to government by martial

law. Hence, the intercourse of foreign nations with such conquered territory is subject to the will of the commander-in-chief. *Rutledge v. Fogg*, (1866) 3 Coldw. (Tenn.) 559.

Government of Porto Rico.—The right of the President as commander-in-chief of the army and navy of the United States under the Constitution to exercise government and control over Porto Rico did not cease or become defunct in consequence of the signature of the treaty of peace, nor from its ratification. It was settled by the judgment of the Supreme Court of the United States in a similar case, arising out of the enforcement of local tariff laws in California subsequently to the cession of that territory and prior to any legislation with reference to it by Congress, that the civil government organized from a right of conquest by the military officers of the United States was continued over the territory as a ceded conquest without any violation of the Constitution or laws of the United States. *Cross v. Harrison*, (1853) 16 How. (U. S.) 164. According to the well-settled principles of public law relating to territory held by conquest, and according to the adjudication of the Supreme Court of the United States in *Cross v. Harrison*, (1853) 16 How. (U. S.) 164, the military authorities in possession, in the absence of legislation by Congress, may make such rules or regulations and impose such duties upon merchandise imported into the conquered territory as they may, in their judgment and discretion, deem wise and prudent. *Porto Rico—Duties*, (1899) 22 Op. Atty. Gen. 561.

2. Establishment of Provisional Government.—The President had power to create military governments and to appoint provisional governors for states then lately in insurrection, but this did not of itself change the general laws then in force for the settlement of the estates of deceased persons, and did not remove from office those who were at the time charged by law with public duties in that behalf.

Ketchum v. Buckley, (1878) 99 U. S. 190, wherein the court said: "It is now settled law in this court that during the late civil war the same general form of government, the same general law for the administration of justice and the protection of private rights, which had existed in the states prior to the rebellion, remained during its con-

tinuance and afterwards. As far as the acts of the states did not impair or tend to impair the supremacy of the national authority, or the just rights of the citizens, under the Constitution, they are in general to be treated as valid and binding." See also *Cross v. Harrison*, (1853) 16 How. (U. S.) 189; *Scott v. Billgerly*, (1866) 40 Miss. 133.

3. Establishment of Provisional Court.—The establishment of a provisional court by a presidential proclamation, upon the suppression of the rebellion, with authority, among other powers, to hear, try, and determine all causes in admiralty, was an exercise of the constitutional authority of the President, and Congress had power, upon the close of the war and the dissolution of the provisional court, to provide for the transfer of causes pending in that court and of its judgments and decrees to the proper courts of the United States.

The Grapeshot, (1869) 9 Will. (U. S.) 131. See also *Lewis v. Cocks*, (1874) 23 Wall. (U. S.) 469; *Scott v. Billgerly*, (1866) 40 Miss. 133.

In *Dooley v. U. S.*, (1901) 182 U. S. 234, the court said: "In the case of *Jecker v. Montgomery*, (1851) 13 How. (U. S.) 498, it was held that neither the President nor

the military commander could establish a court of prize, competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war were nothing more than agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize, although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. *The Grapeshot*, (1869) 9 Wall. (U. S.) 133."

The power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent states occupied by the national forces is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors. *Mechanics*, etc., *Bank v. Union Bank*, (1874) 22 Wall. (U. S.) 296, *affirming* (1873) 25 La. Ann. 387. See also *Burke v. Tregre*, (1870) 22 La. Ann. 629.

VI. POWER TO CONVENE GENERAL COURTS-MARTIAL.—It is within the power of the President of the United States, as commander-in-chief, to validly convene a general court-martial even where the commander of the accused officer to be tried is not the accuser.

Swaim v. U. S., (1897) 165 U. S. 558. See also *Approval of Court-Martial Sentence*, (1877) 15 Op. Atty-Gen. 302.

To appoint general courts-martial is within the power of the President under this clause. As commander-in-chief the President is authorized to give orders to his subordinates, and the convening of a court-martial is simply the giving of an order to certain officers to assemble as a court, and, when so assembled, to exercise certain powers conferred

A court established by the commanding general in New Orleans, on May 1, 1862, on the occupation of the city by the government forces, will, in the absence of proof to the contrary, be presumed to have been authorized by the President. *Mechanics*, etc., *Bank v. Union Bank*, (1874) 22 Wall. (U. S.) 293, *affirming* (1873) 25 La. Ann. 387. See also *Burke v. Tregre*, (1870) 22 La. Ann. 629.

Upon the conquest of New Mexico, in 1846, the commanding officer of the conquering army, in virtue of the power of conquest and occupancy, and with the sanction and authority of the President, ordained a provisional government for the country. The ordinance created courts with both civil and criminal jurisdiction. It did not undertake to change the municipal laws of the territory, but it established a judicial system with a superior or appellate court, and with circuit courts, the jurisdiction of which was declared to embrace, first, all criminal causes that should not be otherwise provided for by law; and, secondly, original and exclusive cognizance of all civil cases not cognizable before the prefects and alcaldes. But though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, they were lawfully established. *Leitenstorfer v. Webb*, (1867) 80 How. (U. S.) 176.

upon them by the articles of war. If this power could not be exercised, it would be impracticable, in the absence of an assignment of a general officer to command the army, to administer military justice in a considerable class of cases of officers and soldiers not under the command of any department commander, as, for example, a large portion of the officers of the general staff, and the whole body of the retired officers. *Runkle v. U. S.*, (1884) 19 Ct. Cl. 409.

VII. POWER TO COURT-MARTIAL OR DETAIN CIVILIANS.—Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

Ex p. Milligan, (1866) 4 Wall. (U. S.) 127. But see *Suspension of Privilege of Writ of Habeas Corpus*, (1861) 10 Op. Atty-Gen. 74.

While the President, as commander-in-chief, has no authority to arrest and to hold for trial before a court-martial or a military tribunal, or to detain for an unreasonable time, persons not in the military service residing in loyal states when civil courts are open, because when the courts are open and the civil authorities are unobstructed, and there is no existing rebellion, martial law does not legally exist, yet within the imme-

diately theatre of insurrection or war the commander-in-chief and his subordinates, when the exigencies of the occasion make it necessary, possess this power of martial law. *Lamar v. Dana*, (1873) 18 Int. Rev. Rec. 163, 14 Fed. Cas. No. 8,006.

The President could not, by virtue of the power vested in him as commander-in-chief of the army and navy, subject the citizens of a loyal state in which the civil courts are open to martial law or render them liable to be punished by military commission for resisting the enforcement of the draft, however reprehensible and disloyal such acts

may be. *In re Kemp*, (1863) 16 Wis. 376, wherein the court said: "Undoubtedly the President, or any general under him, may, when it is deemed necessary for the successful prosecution of military operations, declare martial law over the rebellious states, or over districts in a state of war, and within those limits subject all persons and things

to its operation. In places where hostilities exist, the military authority often declares martial law, which, during its continuance, supersedes and puts in abeyance all civil authority. This is of frequent occurrence, and is a legitimate exercise of the war power."

VIII. POWER TO REPEL INVASION AND SUPPRESS INSURRECTION.— The President has no power to initiate or declare a war against either a foreign nation or a domestic state. But by the Acts of Congress of Feb. 28, 1795, and March 3, 1807, he was authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States. If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."

The *Brig Amy Warwick*, (1862) 2 Black (U. S.) 668. See also *Jackson Ins. Co. v. Stewart*, (1866) 1 Hughes (U. S.) 310, 13 Fed. Cas. No. 7,152.

The right of the President to institute a blockade of ports in possession of the states in rebellion, which neutrals were bound to regard, was affirmed in *The Brig Amy Warwick*, (1862) 2 Black (U. S.) 671.

IX. POWER TO ACCORD BELLIGERENT RIGHTS TO INSURGENTS.— Whether the President, in fulfilling his duties as commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to those engaged therein the character of belligerents, is a question to be decided by him, and the courts must be governed by the decisions and acts of the political department of the government to which this power was intrusted.

The Brig Amy Warwick, (1862) 2 Black (U. S.) 670.

X. POWER TO PERMIT PARTIAL INTERCOURSE WITH THE ENEMY.— Even if, in the absence of congressional action, the power of permitting partial intercourse with a public enemy may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject.

Hamilton v. Dillin, (1874) 21 Wall. (U. S.) 87.

XI. POWER TO EMPLOY SECRET AGENTS.— The President was authorized during the civil war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control.

Totten v. U. S., (1875) 92 U. S. 106, affirming (1873) 9 Ct. Cl. 506.

XII. WHEN COMMANDER-IN-CHIEF OF MILITIA.— The President is made commander-in-chief of the army and navy of the United States at all times; and commander-in-chief of the militia only when called into the actual service of the United States.

Johnson v. Sayre, (1895) 158 U. S. 115.

The President is, by the Constitution, only commander-in-chief of the militia of the sev-

eral states when called into the actual service of the United States. Power of President to Create a Militia Bureau in War Department, (1861) 10 Op. Atty.-Gen. 17.

XIII. APPOINTMENT OF ARMY OFFICERS.— The right of the President to command armies, and direct the minutest movement of the soldier, is very different from the exercise of the power of appointment of a person, by which the higher function of war is performed, through the instrumentality of officers of the army. The power of appointment in the military service is not incident to the President as an exclusive power of his office, but is subject to the advice and consent of the Senate, so that in its exercise there is called into requisition other volition than the mere will of the President.

McBlair v. U. S., (1884) 19 Ct. Cl. 537.

XIV. APPOINTMENT OF REGULAR ARMY OFFICERS TO SERVICE IN MILITIA.— The President, as commander-in-chief, and any commanding officer exercising his powers, may lawfully require any officer of the United States to perform the appropriate duties of his station in the militia when in the service of the United States whenever the public interest shall so require. If it were otherwise, it would be in the power of the states, by omitting to appoint the proper officers, to defeat the whole object of the constitutional provision empowering Congress "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such' part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

Disbursements by Quartermasters to Militia, (1835) 2 Op. Atty.-Gen. 711.

XV. ADMISSION OF MERCHANDISE FROM CONQUERED TERRITORY.— The admission of merchandise into the ports of the United States from conquered territory is governed solely by existing laws passed by Congress, and the President has no power to add to or detract from the force and effect of such laws.

Porto Rico — Duties, (1899) 22 Op. Atty.-Gen. 560.

XVI. "DEPARTMENTS."— The word "departments" clearly means the same thing as in the clause giving Congress the power to vest the appointment of inferior officers in the heads of departments. The "principal officer" in this clause is the equivalent to the "head of department" in the other.

U. S. v. Germaine, (1878) 99 U. S. 511.

ARTICLE II., SECTION 2.

"The President * * * shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

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IX. POWER TO REVOKE PARDON, 26.

I. NATURE OF PARDON — 1. In General. — A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of

officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required.

Knote v. U. S., (1877) 95 U. S. 149, *affirming* (1874) 10 Ct. Cl. 399. See also *U. S. v. Athens Armory*, (1866) 2 Abb. (U. S.) 129, 24 Fed. Cas. No. 14,473.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the

individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or a release, is totally unknown and cannot be acted on. *U. S. v. Wilson*, (1833) 7 Pet. (U. S.) 159.

2. Limited to Crimes and Misdemeanors.—This grant of power to the President is, in its terms, and in its obvious sense, limited to offenses, to crimes and misdemeanors, against the United States; and does not embrace any case of forfeiture, loss, or condemnation, not imposed by law, as a punishment for an offense. It is the power to pardon, to forgive, to withhold punishment, which, without the exercise of that power, the law would inflict. If a fine, forfeiture, or penalty be prescribed by law as a punishment, in whole or in part, for an offense, then the President's pardoning power can reach and relieve it, for he can pardon the offense itself, and when that falls its legal consequences fall with it.

Pardoning Power of President, (1863) 10 Op. Atty.-Gen. 453. See also *Steamboat Minnesota's Case*, (1864) 11 Op. Atty.-Gen. 122.

Military offense.—The crimes or misdemeanors forbidden by the articles of war are offenses against the United States. The Constitution, therefore, forbids any one but the President to pardon those who commit such offenses. *Court Martial—Pardon*, (1888) 19 Op. Atty.-Gen. 106.

Vessels engaged in slave trade.—The President is invested with authority to remit judgments of forfeiture pronounced against vessels, their tackle and apparel, for infractions of an Act of Congress prohibiting slave trade, since a violation of this statute is an offense against the United States. Power of Executive to Remit Forfeitures, (1847) 4 Op. Atty.-Gen. 573.

See also *infra*, VI. 4. *All Offenses Other than Impeachment*.

II. EXCLUSIVE POWER OF PRESIDENT — 1. In General.—This grant of power to pardon offenses against the United States to the President alone forbids the exercise of it by any one else.

Court Martial—Pardon, (1888) 19 Op. Atty.-Gen. 106.

Offense committed in a territory.—The President alone has the power to pardon offenses committed in a territory in violation

of Acts of Congress. *Pardoning Power*, (1855) 7 Op. Atty.-Gen. 561.

As to the power of the governor of a territory to grant pardons for offenses against the laws of the territory, and respites for

offenses against the laws of the United States, till the decision of the President can be known thereon, see sec. 1841, R. S., 7 Fed. STAT. ANNOT. 250.

Offense committed in place ceded to national government. — The President alone can have the right to pardon one convicted of an offense committed within a fort or other building or place the exclusive jurisdiction of which has been ceded to the United States, though the act should occur within the limits of the state. Pardoning Power, (1855) 7 Op. Atty.-Gen. 561.

Suspension of sentence by the court. — An indefinite suspension of sentence is beyond the power of the court. There can be no doubt of the right of a court temporarily to suspend its judgment, and continue to do so

from time to time in a criminal cause, for the purpose of hearing and determining motions and other proceedings which may occur after verdict, and which may properly be considered before judgment, or for other good cause. In this cause, however, the record does not show that the suspension was for any reason, or for a certain or short time; but, on the contrary, it appears that it was for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them. Instead of this being a mere suspension of sentence, it operated as a condonation of the offense, and an exercise of a pardoning power which was never conferred upon the court. *U. S. v. Wilson*, (1891) 46 Fed. Rep. 749.

2. Power of Congress to Control. — The power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.

Ex p. Garland, (1866) 4 Wall. (U. S.) 380. See also Pardoning Power of President, (1852) 5 Op. Atty.-Gen. 582; Effect of Pardon, (1857) 8 Op. Atty.-Gen. 281; Prize — Remission of Forfeiture, (1901) 23 Op. Atty.-Gen. 360.

The provision of the Act of July 12, 1870, "That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom," was held to be invalid as impairing the effect of a pardon, and thus infringing the constitutional power of the executive. "It is the intention of the Constitution that

each of the great co-ordinate departments of the government — the legislative, the executive, and the judicial — shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon, and it is granted without limit." *U. S. v. Klein*, (1871) 13 Wall. (U. S.) 147.

Except in cases arising in the military or naval service, the pardoning power of the President is unrestrained by legislative control. *People v. Bowen*, (1872) 43 Cal. 441.

Congress has no power by legislation to abridge the effect of the President's pardon. A person convicted of desertion from the military service and afterwards pardoned by the President, under section 1118, R. S., would be restored by reason of the pardon to all the rights and privileges of a citizen which he had anterior to such conviction. But whilst Congress has no power, by legislation, to abridge the effect of the President's pardon, yet Congress has the right to prescribe qualifications and conditions for enlisted men, and to forbid those not possessing such qualifications, and as to whom such conditions do not exist, to enter the military service. So, whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz., that his service was not honest and faithful. *Army — Enlistment — Pardon*, (1898) 22 Op. Atty.-Gen. 39.

3. Power of Congress to Pass Amnesty Acts. — Although the Constitution vests in the President the "power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment," this power does not take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction.

Brown v. Walker, (1896) 161 U. S. 601, saying that the Act of Congress of Feb. 11, 1893, ch. 83, 27 Stat. at L. 443, securing to a witness immunity from prosecution, when compelled to testify on matters tending to

incriminate, is virtually an Act of amnesty, and valid.

Limiting President's power. — The pardoning power granted to the President is absolute.

lute, and is not the subject of legislative control. The Edmunds Act, relating to the offense in Utah of unlawful cohabitation, cannot be construed to operate as a limitation of the President's pardoning power by con-

fining the "amnesty" therein authorized to offenders who were such before a designated time. *President's Pardoning Powers — Amnesty*, (1893) 20 Op. Atty-Gen. 668.

4. Statutory Power of Secretary of Treasury to Remit Forfeitures.— The power of the President to pardon offenses does not preclude Congress from giving the secretary of the treasury the authority to remit penalties and forfeitures.

The *Laura*, (1885) 114 U. S. 415, wherein the court said: "The President, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress; and, equally, that his constitutional power in these respects cannot be interrupted, abridged, or limited by any legislative enactment. But is that power exclusive, in the sense that no other officer can remit forfeitures or penalties incurred for the violation of the laws of the United States? This question cannot be answered in the affirmative without adjudging that the practice in reference to remissions by the secretary of the treasury and other officers, which has been observed and

acquiesced in for nearly a century, is forbidden by the Constitution." *Affirming* (1881) 8 Fed. Rep. 612.

In cases of mere forfeiture or other penalties accruing to the treasury under the Acts of Congress relative to the transportation of passengers, the secretary of the treasury may remit, as in similar cases arising under the revenue laws. This does not exclude the general power of the President to pardon, and where, under the same laws, personal punishment is inflicted, the case can be reached only through the pardoning power of the President. *Passenger Laws — Pardoning Power*, (1854) 6 Op. Atty-Gen. 488.

III. TIME POWER MAY BE EXERCISED.— The power may be exercised at any time after the commission of an offense, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.

Ex p. Garland, (1866) 4 Wall. (U. S.) 380. See also *Pardoning Power of President*, (1853) 6 Op. Atty-Gen. 20; *People v. Bowen*, (1872) 43 Cal. 441.

At any time, either anterior to prosecution, or pending the same, or subsequently to the execution in part or in whole of sentence, the President may pardon, subject in the latter case only to the limits of legal, moral, or

physical possibility. *Effect of Pardons*, (1857) 8 Op. Atty-Gen. 284.

After security given for payment of judgment.— The President possesses the same power over a judgment after security for its payment shall have been given, as before. *Reprieves and Pardons*, (1839) 3 Op. Atty-Gen. 418.

IV. PROMISE TO PARDON.— A promise to pardon is not a pardon, and may at any time be withdrawn. But a pardon may be offered, and the offer kept open and thus be continuing, so that the person to whom it is offered may accept it at a future day.

Pardoning Power, (1865) 11 Op. Atty-Gen. 230.

V. PARDON AND RECORD OF CONVICTION TO CORRESPOND.— A pardon which recites a conviction at "June term" of the offense of "counterfeiting the silver coin," and a "sentence" thereon of "imprisonment," cannot be made to apply to a record of conviction at the "May sessions" of two felonies — one "forging and counterfeiting ten pieces of coin," etc., the other "uttering and passing" them — on which there is a sentence of "fine" as well as imprisonment. Neither the time of conviction, nor the offenses, nor the judgments correspond.

Stetler's Case, (1852) 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

VI. EXTENT OF PARDONING POWER — 1. *Relation to Powers of British Crown.* — The word "pardon" must be given the same meaning as prevailed here and in England at the time it found a place in the Constitution.

Ex p. Wells, (1855) 18 How. (U. S.) 311. To understand the meaning of a pardon, and the extent to which the power of pardoning may be rightfully exercised by the President of the United States, we must look to the books of authority belonging to the king of Great Britain, to the common law of the people of England, whose principles of jurisprudence the people of the United States brought with them as colonists and established here, in so far as they were of a general nature, not local to that kingdom and not repugnant to the American institutions. Pardoning Power of President, (1852) 5 Op. Atty-Gen. 536.

"The powers of the President, in this respect, cannot be enlarged by analogy to the powers of an English king, because the powers of the two have their origin and mode of existence in different and opposite principles. (See Bl. Com., book 4, ch. 31.) His (the king's) power of pardoning was said by our Saxon ancestors to be derived *a lege suae dignitatis*; and it is declared in Parliament, by stat. 27 Hen. VIII., that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm."

And hence, in a former opinion (of July 5, 1861), speaking of the pardoning power and some others of that nature, I said: "These belong to that class which, in England, are called prerogative powers, inherent in the crown. And yet the framers of our Constitution thought proper to preserve them, and to vest them in the President, as necessary to the good government of the country." As far as they are so preserved and vested they are legitimate powers in the hand of the President. But they are not prerogatives—they are legal powers vested in, and duties imposed upon, the President by the letter of the Constitution; and they are to be exercised and judged of as other granted powers and imposed duties are. The power to grant reprieves and pardons is given, in terms, to the President; but the power to remit forfeitures, fines, and penalties (as distinct from the pardon of crimes) is not given. Yet the king had both powers. And necessarily so, in the theory of the English government, in which the king is the only person offended by the commission of crimes, and the only owner of things forfeited, unless expressly provided otherwise by statute." Pardoning Power of President, (1863) 10 Op. Atty-Gen. 454.

2. Authority to Investigate Facts.—The power of pardon neither requires nor authorizes the President to enter into an investigation of facts, not set up nor proven at the trial, which, if true, should have been thus interposed to the indictment, after a trial and conviction, an appeal, and a decision adverse to the accused by the Supreme Court of the United States.

Pardon of Piratical Murder, (1820) 1 Op. Atty-Gen. 359.

3. Finding of Innocence.—If executive clemency is to be exercised, it ought not to appear as a finding of innocence.

Prize—Remission of Forfeiture, (1901) 23 Op. Atty-Gen. 360.

4. All Offenses Other than Impeachment.—The power of pardon in the President embraces all offenses against the United States, except cases of impeachment, and includes the power of remitting fines, penalties, and forfeitures.

U. S. v. Harris, (1866) 1 Abb. (U. S.) 110, 26 Fed. Cas. No. 15,312. See also *Ex p. Garland*, (1866) 4 Wall. (U. S.) 380; Pardoning Power of President, (1852) 5 Op. Atty-Gen. 582.

"The exception in this provision, according to a well-established maxim of law, strengthens its application to all offenses not excepted: so that we can certainly say that

there can be no offense against the United States, except cases of impeachment, over which the President has not an absolute pardoning power." *U. S. v. Thomasson*, (1869) 4 Biss. (U. S.) 336, 28 Fed. Cas. No. 16,479.

By the common form of a general warrant of pardon the power may be exercised. Effect of Pardons, (1857) 8 Op. Atty-Gen. 284.

5. Power to Proclaim General Pardon and Amnesty.—A proclamation of absolute and general pardon and amnesty is within the power of the President without legislative authority or sanction.

Armstrong v. U. S., (1871) 13 Wall. (U. S.) 154. See also *Pargoud v. U. S.*, (1871) 13 Wall. (U. S.) 156; *Carlisle v. U. S.*, (1872) 16 Wall. (U. S.) 147; *Morgan's Case*, (1885) 18 Op. Atty-Gen. 180.

The President has the constitutional power, without congressional authority, to issue a general pardon or amnesty to classes of offenders. Amnesty—Power of President, (1892) 20 Op. Atty-Gen. 330.

As to the proclamation of pardon issued on Dec. 8, 1863, the court said: "This proclamation, if it needed legislative sanction, was fully warranted by the Act of July 17, 1862, which authorized the President, at any time thereafter, to extend pardon and amnesty to persons who had participated in the rebellion, with such exceptions as he might see fit to make. That the President had power, if not otherwise, yet with the sanction of Congress, to grant a general conditional pardon, has not been seriously

questioned. And this pardon, by its terms, included restoration of all rights of property except as to slaves and as against the intervening rights of third persons." *U. S. v. Padelford*, (1869) 9 Wall. (U. S.) 542..

Whether or not the President has power to grant a general pardon, a "full and unconditional pardon" is limited by the recital of a single offense in the preamble and is valid. *Stetler's Case*, (1852) 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

Has Force of Public Law.— "As the general pardon and amnesty to all persons implicated in the rebellion are not pleaded by the defendant, to relieve the offending party, whose life estate in the premises in controversy was confiscated, from his disabilities respecting the reversionary interest, or naked fee in the premises, it is claimed that no benefit can be derived from them. But this result does not follow from the omission in pleading, for the pardon and amnesty were made by a public proclamation of the President, which has the force of public law, and of which all courts and officers must take notice, whether especially called to their attention or not."

Jenkins v. Collard, (1892) 145 U. S. 560.

6. Partial and Continued Exercise of Power.— The power of the executive to grant reprieves and pardons extends to the remission of fines, penalties, and forfeitures and costs in criminal cases, and may be exercised in degrees at different times at the discretion of the incumbent of the office. A portion of a sentence may be remitted at one time, and another portion of it at another time and by another executive.

Reprieves and Pardons, (1839) 3 Op. Atty.-Gen. 418.

A defendant was convicted and sentenced "to six months' imprisonment, to pay a fine of one hundred and fifty dollars, and the costs of prosecution." The President granted a pardon, reciting "that Nathan Lukins was confined in the jail of Philadelphia under sentence of the Circuit Court of the United States, whereby he was bound to pay a pecuniary fine to the United States, and to stand committed until the fine and costs should be fully satisfied," and proceeding to state that the President "remits the fine aforesaid; hereby ruling and requiring that Nathan Lukins, on payment of the costs of prosecution, be forthwith discharged from imprisonment." At the foot of the record of conviction, which had been transmitted to the executive, was written by the President,

"Let the fine be remitted on payment of costs." The intention was to remit the fine only, and the fine only being pardoned, the President cannot order the prisoner to be discharged from the residue of the sentence. If he pardons generally, remission of fine and discharge follow. *U. S. v. Lukins*, (1841) 26 Fed. Cas. No. 15,638.

The power to pardon is not exhausted by its partial use, and part of a penalty may be forgiven at one time, and at a future time another part, and so on until the whole is forgiven. *Pardoning Power*, (1865) 11 Op. Atty.-Gen. 227.

The President has authority to pardon an offense, so long as any of its legal consequences remain. *Stetler's Case*, (1852) 1 Phila. (Pa.) 302, 9 Leg. Int. (Pa.) 38, 22 Fed. Cas. No. 13,380.

7. Sentence for Contempt.— Fines imposed by a co-ordinate department of the government for contempt of its authority may not be remitted by the President.

The Laura, (1885) 114 U. S. 413, *affirming* (1881) 8 Fed. Rep. 612.

Held not to have power to pardon.— An order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the

remedies of a party to the action is civil and remedial, and not criminal, in its nature; it does not fall within the pardoning power of the President, because it is not an execution of the criminal laws of the land; and it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court

alone, either in the original case or in an appropriate auxiliary proceeding. *In re Nevitt*, (C. C. A. 1902) 117 Fed. Rep. 453.

Held to have power to pardon.—Upon a judgment that a party “has been guilty of a wilful and persistent disobedience to the order and injunction of this court, and that he be fined therefor the sum of twenty-five hundred dollars, the same to be paid to the complainants towards the reimbursement of their expenses in and about such attachment proceedings, and that he stand committed until the said fine be paid,” the contempt of court was an offense against the United States, and the fine was inflicted as a punishment therefor, and relief, in the nature of a discharge on the ground that the petitioner is unable to pay the fine, must be sought by an application to the President. *In re Mullee*, (1869) 7 Blatchf. (U. S.) 23, 17 Fed. Cas. No. 9,911.

The pardoning power vested in the President extends to fines imposed upon individuals for conduct adjudged to be contempt. Respecting Pardoning Power, (1841) 3 Op. Atty.-Gen. 622.

The President has power to grant a pardon to a prisoner undergoing punishment for a contempt of court. *Pardon*, (1890) 19 Op. Atty.-Gen. 476.

Defaulting jurors.—The power vested in the President to grant reprieves and pardons for offenses against the United States is sufficient to authorize him to remit a fine imposed upon a citizen for contempt in neglecting to serve as a juror. Power of President to Remit Fines for Contempt, (1844) 4 Op. Atty.-Gen. 317; Power of President to Remit Fines Against Defaulting Jurors, (1845) 4 Op. Atty.-Gen. 458.

8. Forfeitures in Cases of Prizes of War.—The President has authority to grant remission of forfeitures in cases of prizes of war after the vessels have been condemned, but before the prize money has been deposited in the treasury of the United States.

Prize—Remission of Forfeiture, (1901) 23 Op. Atty.-Gen. 360, wherein the attorney-general said: “By this opinion I do not desire to be taken as overruling the opinion of my predecessor, Mr. Bates (*Pardoning Power of President*, (1863) 10 Op. Atty.-Gen. 452), wherein he held that, in the condemnation of a vessel in a prize court, no person is charged with an offense, and so no person is in a condition to be relieved and reinstated by a pardon, and that after a regular condemnation of a vessel and cargo in a prize court for breach of blockade the President cannot remit the forfeiture and restore the property or its proceeds to the claimant. I intend to express hereby no opinion whatever in regard to the conclusions reached in that case, which, however, so far as the facts appear, can plainly be distinguished from the cases in hand, for it seems that the prize money there had already been appropriated and distributed by law and therefore must have passed into the treasury of the United States.”

The condemnation of a vessel and cargo in

a prize court is not a criminal sentence. No person is charged with the offense, and so no person is in condition to be relieved and reinstated by a pardon. There is nothing upon which a pardon granted by the President in the terms of the Constitution can operate. *Pardoning Power of President*, (1863) 10 Op. Atty.-Gen. 452, the attorney-general saying: “The share apportioned to the captors has become a vested right; and the part which did belong to the United States is vested by law in the navy pension fund. The part given by law to individual captors is, avowedly, a bounty, designed to stimulate the zeal and courage of our naval men; and the part reserved to the nation is transferred by law to the navy pension fund, which is only another form of a bounty to the same meritorious class. And, in my opinion, neither portion can be rightfully withdrawn from its legal destination by any executive act under the authority of the pardoning power.” See also *Steamboat Minnesota’s Case*, (1864) 11 Op. Atty.-Gen. 122; *The Adelsø*, (1866) 11 Op. Atty.-Gen. 445.

9. Power to Commute.—The general power to pardon conferred upon the President includes the power to pardon conditionally or to commute to a milder punishment that which has been adjudged against the offender. When a sentence of death has been commuted to imprisonment for life in a penitentiary, the convict stands in precisely the same legal condition as if he had been sentenced by the court to imprisonment for life in a penitentiary.

Imprisonment of Indian See-See-Sah-Ma, (1851) 5 Op. Atty.-Gen. 370.

VII. VALIDITY OF PARDON—1. May Be Conditional.—It is competent for the President to annex to his offer of pardon any conditions or qualifications he may see fit; but after those conditions and qualifications have been satisfied, the pardon and its connected promises take full effect.

U. S. v. Klein, (1871) 13 Wall. (U. S.) 142.

"The power as given is not to reprieve and pardon, but that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. * * * The real language of the Constitution is general, that is, common to the class of pardons, or extending the power to pardon to all kinds of pardons known in the law as such, whatever may be their denomination. We have shown that a conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case, or some cause connected with the offender, may require it, but it extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane, or is alleged to be so. Though the reprieve in either case produces delay in the execution of a sentence, the means to be used to determine either of the two just mentioned are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, and different as to the causes which may induce the exercise of the power to reprieve. In this view of the Constitution, by giving to its words their proper meaning, the power to pardon conditionally is not one of inference at all, but one conferred in terms." *Ex p. Wells*, (1855) 18 How. (U. S.) 314.

A pardon may be absolute or conditional. — *U. S. v. Wilson*, (1833) 7 Pet. (U. S.) 161.

A pardon may be special in its character or subject to conditions and exceptions. — *Semmes v. U. S.*, (1875) 91 U. S. 21.

Conditions must be legal and consistent. — A pardon may be upon conditions, and those conditions may be precedent or subsequent. The conditions, however, appended to a pardon cannot be immoral, illegal, or inconsistent with the pardon. Pardoning Power, (1865) 11 Op. Atty-Gen. 229.

Offer to Commute Death Sentence to Life Imprisonment. — The President can constitutionally grant a conditional pardon to a convicted murderer sentenced to be hung, offering to change that punishment to imprisonment for life, and if he does and it be accepted by the convict it is binding upon him, and a writ of habeas corpus applied for upon the ground that the pardon is absolute and the condition of it void will be refused.

Ex p. Wells, (1855) 18 How. (U. S.) 309.

2. Necessity for Delivery and Acceptance of Pardon — *a. IN GENERAL.* — A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, there is no power in a court to force it on him. It may be supposed that no being condemned to death would reject pardon; but the rule must be the same in capital cases and in misdemeanors.

The President has power to grant a conditional pardon to a convict, provided the condition be compatible with the genius of our Constitution and laws. Conditional Pardons, (1821) 1 Op. Atty-Gen. 482.

On taking prescribed oath. — When a pardon is granted with a condition that it is to begin and take effect from the day on which a prescribed oath is taken, it has no vitality until the condition is complied with. The acceptance of the pardon does not supersede the necessity of taking the oath prescribed. *Waring's Case*, (1871) 7 Ct. Cl. 502.

On payment of fine—discharge as poor convict. — Where one has been sentenced to imprisonment and payment of a fine and costs, "a full pardon on condition that he shall first pay the fine and costs aforesaid" is a condition precedent, and there is no right to discharge as a poor convict. *In re Ruhl*, (1878) 5 Sawy. (U. S.) 186, 20 Fed. Cas. No. 12,124.

On waiver of claim to forfeited property. — When a pardon is granted upon a condition that the grantee should not claim any property or proceeds of any property that had been sold by a judicial order, the condition is a bar to any claim. *U. S. v. Six Lots Ground*, (1872) 1 Woods (U. S.) 234, 27 Fed. Cas. No. 16,299.

The pardon of the President may be conditional and may remit a part of the sentence or penalty without remitting the whole, and he can pardon a deserter so as to re-enfranchise him and at the same time make the pardon conditional upon his not being entitled to any moneys which he has forfeited by the crime of desertion. Pardon for Desertion, (1872) 14 Op. Atty-Gen. 125.

No power to carry condition into effect. — Where the condition is such that the government has no power to carry it into effect, the pardon will be, in effect, unconditional. Application for Pardon of See-See-Sah-Ma, (1851) 5 Op. Atty-Gen. 368.

U. S. v. Wilson, (1833) 7 Pet. (U. S.) 161. See also Matter of De Puy, (1869) 3 Ben. (U. S.) 307, 7 Fed. Cas. No. 3,814.

"It is urged that a pardon is inoperative until accepted, and that it does not affirmatively appear that this petitioner has accepted the pardon. The opinion of Chief Justice Marshall in U. S. v. Wilson, (1833) 7 Pet. (U. S.) 150, is referred to. The decision in that case settles nothing upon the question whether, where an unconditional pardon is granted, which the grantee refuses to accept, he can, nevertheless, allege that he is restrained of his liberty, while the pardon remains unrevoked and ready for his acceptance at any moment he pleases, he having notice thereof. The decision and all that was said by the venerable and learned chief justice may be assumed, without abatement or qualification; but the circumstances of the case and the precise point decided are of some

importance, when sought to be applied to this motion. There was there no application for a writ of habeas corpus, nor any claim by the grantee of the pardon that he was held in restraint of his liberty by reason of the offense which the pardon had forgiven." *In re Callicot*, (1870) 8 Blatchf. (U. S.) 89, 4 Fed. Cas. No. 2,323.

After the pardon has been accepted, it becomes a valid act, and the person receiving it is entitled to all its benefits. *Pardoning Power*, (1865) 11 Op. Atty.-Gen. 230.

The acceptance of a pardon is a confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow. *Pardoning Power*, (1865) 11 Op. Atty.-Gen. 228.

But see *Ex p. Garland*, (1866) 4 Wall. (U. S.) 380, noted *infra*, under *Effect of Pardon — In General*.

b. VOLUNTARY ACCEPTANCE OF CONDITIONAL PARDON. — A conditional pardon accepted by a convict is deemed to be accepted voluntarily, and not under duress *per minas*.

Ex p. Wells, (1855) 18 How. (U. S.) 315; *In re Greathouse*, (1864) 4 Sawy. (U. S.) 487, 10 Fed. Cas. No. 5,741.

3. Pardon Procured by Fraud. — A pardon procured by fraud or for a fraudulent purpose, upon the suppression of the truth or the suggestion of falsehood, is void.

Pardoning Power, (1865) 11 Op. Atty.-Gen. 227.

VIII. EFFECT OF PARDON — 1. In General. — If a party has gone through the whole or a part of the physical incidents of prosecution and sentence, what is thus done cannot be undone. Stripes, confinement, maiming, death, when inflicted, have become irremissible. There the pardoning power encounters physical impeachment.

Effect of Pardons, (1857) 8 Op. Atty.-Gen. 234.

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." *Ex p. Garland*, (1866) 4 Wall. (U. S.) 380.

Commenting on the above case, Deady, J., in *In re Spenser*, (1878) 5 Sawy. (U. S.) 195, 22 Fed. Cas. No. 13,234, said: "This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offense."

2. Includes Amnesty. — Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences.

U. S. v. Klein, (1871) 13 Wall. (U. S.) 147.

Amnesty is an act of sovereign power, granting oblivion or a general pardon for a past offense, and is rarely if ever exercised

in favor of single individuals, and is usually exercised in behalf of certain classes of persons who are subject to trial but have not yet been convicted. *Brown v. Walker*, (1896) 161 U. S. 601.

3. Other Offenses Not Released.—A pardon releases the offender from the consequences of the offense pardoned and from the disabilities imposed by that offense, but cannot embrace any other offense for which separate penalties and punishments are prescribed.

Ex p. Weimer, (1878) 8 Biss. (U. S.) 321, 29 Fed. Cas. No. 17,362.

4. Remission of Fines, Penalties, and Forfeitures—*a.* IN GENERAL.—When guilt and punishment have been expunged by a pardon, the party in being restored to all his rights, privileges, and immunities is restored to the control of so much of his property and estate as has not become vested in the government or in any other person.

Illinois Cent. R. Co. v. Bosworth, (1890) 133 U. S. 100, holding that the disability of an offender against the government of the United States to enjoy or dispose of the fee simple or naked property in reversion, expectant upon the determination of the estate in property confiscated under the Act of July 17, 1862, was removed by a pardon. See also *Ex p. Weimer*, (1878) 8 Biss. (U. S.) 321, 29 Fed. Cas. No. 17,362.

The constitutional grant to the President of the power to pardon offenses must be held to carry with it, as an incident, the power to release penalties and forfeitures which accrue from the offense. *Osborne v. U. S.*, (1875) 91 U. S. 477, wherein the court said: "It is of the very essence of a pardon that it releases the offender from the consequences of his offense. If in the proceedings to establish his culpability and enforce the penalty, and before the grant of the pardon, the rights of others than the government have

vested, those rights cannot be impaired by the pardon. The government having parted with its power over such rights, they necessarily remain as they existed previously to the grant of the pardon. The government can only release what it holds. But unless rights of others in the property condemned have accrued, the penalty of forfeiture annexed to the commission of the offense must fall with the pardon of the offense itself, provided the full operation of the pardon be not restrained by the conditions upon which it is granted."

The President has power to pardon or remit the fines, penalties, and forfeitures which have been incurred by the master or owners of a vessel for offenses which have been committed in violation of the statutes for regulating the conveying of passengers in merchant vessels. *Passenger Laws—Pardoning Power*, (1854) 6 Op. Atty.-Gen. 393.

***b.* PENALTY ACCRUING TO UNITED STATES.**—A general pardon relieves from so much of a penalty of forfeiture of property as accrued to the United States.

Armstrong's Foundry, (1867) 6 Wall. (U. S.) 769.

A pardon does not restore the right to sue the government for property forfeited. *Parpoud v. U. S.*, (1868) 4 Ct. Cl. 337.

Discharge of recognizances taken in criminal proceedings.—This clause does not embrace or include within it power to discharge or reduce debts that are due to the United States in consequence of the liability imposed by judgments obtained against sureties in recognizances taken in criminal proceedings

before the courts of the United States. *McCracken's Case*, (1864) 11 Op. Atty.-Gen. 124.

The President has no power to remit a forfeiture of a bail bond. *Power of President to Remit Forfeitures of Bail Bonds*, (1843) 4 Op. Atty.-Gen. 144.

After return of execution on *sci. fa.* against the surety of an absconding criminal charged with violation of Acts of Congress, the only mode of relieving the surety is by exercise of the pardoning power. *Pardoning Power*, (1854) 6 Op. Atty.-Gen. 408.

***c.* RESTITUTION OF FINES.**—Where a pardon is full and unqualified, express words of restitution in the pardon are not needed to entitle its recipient to restitution. The right thereto results by the mere fact of such a pardon, and if money paid in satisfaction of a fine imposed has not been covered into the treasury, but still remains under the control of the executive, it should be restored.

Pardon—Restitution of Fine, (1878) 16 Op. Atty.-Gen. 1. See also *Effect of Pardon—Remission of Fine*, (1872) 14 Op. Atty.-Gen. 599. But see *contra*, *Smith's Case*, (1861) 10 Op. Atty.-Gen. 1.

A pardon restores pecuniary penalties already paid to an officer of the government unless the money has already passed into the treasury; and where a person convicted of a crime against the United States was sen-

tenced to fine and imprisonment and subsequently received an unconditional pardon from the President, but previous thereto had paid the amount of the fine to the marshal, by whom it was deposited in court, the fine was remitted by the pardon and the money should be restored to the person pardoned. *Effect of Pardon—Remission of Fine*, (1872) 14 Op. Atty.-Gen. 599.

In *Pardoning Power of President*, (1852) 5 Op. Atty.-Gen. 579, the attorney-general advised (1) that the pardoning power of the President extended over the whole case, and that by his pardon he might discharge them from prison and remit the fines for which they were imprisoned; (2) that, if the President could not remit the fines be-

cause they had become private property, he could still pardon and release the offending parties from imprisonment, because such imprisonment was part of the proceedings against them as criminals, and at the instance of the United States, and was a thing distinct from any individual right of property in the fines; (3) that the President might pardon the offense and imprisonment, with an exception or saving as to the fines, in which case the fines would remain as a debt to the United States, or to those to whom the United States had granted or transferred it, and would be recoverable accordingly by the appropriate legal remedies, which remedies the distributees of the fines would have if they were entitled to any absolute right or property in the fines.

d. MONEY PAID INTO THE TREASURY. — The power is coextensive with the punishing power and extends to cases of penalties and forfeitures, with a limitation that a fine or penalty may not be remitted if the money has been paid into the treasury.

Prize—Remission of Forfeiture, (1901) 23 Op. Atty.-Gen. 360. See also *Pardons and Remission of Forfeitures*, (1830) 2 Op. Atty.-Gen. 329.

When a pecuniary penalty, accruing to the United States, has been actually paid into the treasury, although it may be remitted of right by the President, still, by reason of constitutional prohibition, which is coequal in force with the constitutional power to pardon, the amount of the penalty cannot be drawn from the treasury without appropriation by Act of Congress. *Effect of Pardons*, (1857) 8 Op. Atty.-Gen. 281.

"The test, then, is whether the proceeds of a fine, penalty, or forfeiture has passed into the treasury of the United States. If not,

the pardoning power of the President may act upon it, and this view is analogous with the decision in the *Confiscation Cases*, (1868) 7 Wall. (U. S.) 454 (and see also *U. S. v. Morris*, (1825) 10 Wheat. (U. S.) 290; *Dorsheimer v. U. S.*, (1868) 7 Wall. (U. S.) 166), in which it was determined in relation to the interest of informers that a judgment of condemnation can have no other effect than to fix and determine their interests as against the claimant, should no remission take place, and that their right does not become fixed until the receipt of the money by the collector or other authorized depository of the United States, or until the money has actually been paid over as required by law." *Prize—Remission of Forfeiture*, (1901) 23 Op. Atty.-Gen. 363.

e. STATUTE PROHIBITING PAYMENT OF MONEY. — An executive pardon would relieve the person pardoned from penalties and disabilities, but could not authorize officers of the government to pay him moneys which might be due to him, if they were prohibited from so doing by a subsequent statute.

Hart's Case, (1880) 16 Ct. Cl. 460, *affirmed* (1886) 118 U. S. 62.

f. RIGHT OF PRIVATE PERSON TO SHARE OF PENALTY.

The right of a private person to a share of a penalty by reason of his being an informer, or having instituted a prosecution under a penal law, is released by a pardon unless actually vested by judgment. *U. S. v. Culbertson*, (1878) 8 Biss. (U. S.) 166, 25 Fed. Cas. No. 14,899. See *U. S. v. Lancaster*, (1821) 4 Wash. (U. S.) 64, 26 Fed. Cas. No. 15,557.

"But what can the President remit? Can his pardon reach the officer's share? It has already appeared by *U. S. v. Morris*, (1825) 10 Wheat. (U. S.) 246, that the power of the secretary of the treasury, which is conferred by statute, extends to the share of the officer as well as of the government,

and terminates only when the money is paid to the collector for distribution. It should, however, be borne in mind that this view is sustained by the court on the construction of the Act giving the secretary power to remit. It does not follow that a pardon, under the President's constitutional power, would have the same effect to defeat the vested right of the officer making the seizure. Judge Washington, in the case of *U. S. v. Lancaster*, (1821) 4 Wash. (U. S.) 64, 26 Fed. Cas. No. 15,557, is of opinion that the pardon of the President could not have that effect; that its influence extends only to a remission of all the interests of the United States, and accordingly held that the pardon in that case, which purported to remit

all the right and interest of the United States, did not touch the officer's share. The remark of the judge in that case is undoubtedly correct, that according to the doctrine of the common law of England the king cannot, in the exercise of his prerogative of pardon, defeat a legal interest or benefit vested in a subject. The authorities cited by him appear to sustain the position (6 Bacon 145; 3 Inst. 240, 241; 1 Chitty 742, 764). If that rule prevails in England, it would seem that it should be adopted in this country, if we follow the authority of Chief Justice Marshall, in the case of *U. S. v. Wilson*, (1833) 7 Pet. (U. S.) 160, wherein he says: 'As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.' Power of Executive to Remit Forfeitures, (1847) 4 Op. Atty-Gen. 576.

"It is admitted by all American jurists and commentators upon the Constitution, that the President's power to pardon includes the power to remit fines, penalties, or forfeitures. That power in him is plenary, and is conferred by the Constitution in terms at least as ample, absolute, and comprehensive as those used in the statute to confer on the secretary the power to 'remit' fines, forfeitures, and penalties. And as it has been solemnly decided by the Supreme Court, that the statutory authority of the secretary does enable him, by his remission, to release and discharge after judgment the share of the custom officers in those penalties and forfeitures, it seems to me that it must necessarily follow, upon the same rules of construction and the same principles of law, that the more unlimited constitutional power of the President enables him, by his pardon, to remit fines adjudged in criminal prosecution, although those fines may by law have been distributable to informers or other in-

dividuals. The interest of such informers and individual distributees is altogether conditional and subordinate to the power of pardon or remission, and vests no absolute right in them 'until the money is received.' So says the Supreme Court. The analogy of the case of *U. S. v. Morris*, (1825) 10 Wheat. (U. S.) 281, to the present question, is too obvious and decisive to require further remark or illustration." Pardoning Power of President, (1852) 5 Op. Atty-Gen. 588.

Can be remitted after judgment.—After a judgment for a penalty under the internal revenue laws, and after the court had adjudged a moiety thereof to the informer, the President can constitutionally, by his pardon, defeat the informer's right to that moiety. Congress cannot constitutionally by any provision in acts providing for the infliction of penalties for offenses against the United States, in any respect or degree, limit or modify the constitutional power thus conferred on the President. *U. S. v. Thomasson*, (1869) 4 Biss. (U. S.) 336, 28 Fed. Cas. No. 16,479.

It is not competent for the President, in the exercise of the pardoning power, to remit pecuniary penalties attached to an offense, unless those penalties accrue to the United States. The punishment in the District of Columbia, for the unlawful transportation of slaves, by the laws of Maryland applicable to the District, is by fine, which the statute appropriates for the owner of the slaves, and cannot be remitted by the President. Pardoning Power of President, (1852) 5 Op. Atty-Gen. 532.

A proper interpretation of the Constitution limits the power of pardon confided to the President, after a judgment ordering a portion of the fine to be paid to a private citizen, to a remission of the share of the government only, and it is inoperative to divest an interest vested by such judgment in the citizen. *U. S. v. Harris*, (1866) 1 Abb. (U. S.) 110, 26 Fed. Cas. No. 15,312. See also Passenger Laws—Pardoning Power, (1854) 6 Op. Atty-Gen. 488.

g. CONFISCATED PROPERTY CONDEMNED AND SOLD.—The general pardon and amnesty granted by President Johnson, by proclamation, on the 25th of December, 1868, did not entitle one receiving the benefits thereof to the proceeds of his property, previously condemned and sold under the Confiscation Act of 1862, after such proceeds had been paid into the treasury.

Knote v. U. S., (1877) 95 U. S. 149, in which the court said: "Moneys once in the treasury can only be withdrawn by an appropriation by law. However large, therefore, may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers—it cannot touch moneys in the treasury of the United States, except expressly authorized by Act of Congress. The Constitution places this restriction upon the pardoning power. Where, however, property condemned, or its proceeds, have not

thus vested, but remain under control of the executive, or of officers subject to his orders, or are in the custody of the judicial tribunals, the property will be restored or its proceeds delivered to the original owner, upon his full pardon." *Affirming* (1874) 10 Ct. Cl. 399.

Conceding that amnesty did restore what the United States held when the proclamation was issued, it would not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession

or expectancy. *Wallach v. Van Riswick*, (1875) 92 U. S. 202. See also *Semmes v. U. S.*, (1875) 91 U. S. 21; *Brown v. U. S.*, (1868) *Woolw. (U. S.)* 198, 4 Fed. Cas. No. 2,032.

A pardon and amnesty do not annul past transactions so far as to invalidate a previous judicial confiscation and sale of property. *U. S. v. Six Lots Ground*, (1872) 1 *Woods (U. S.)* 234, 27 Fed. Cas. No. 16,299.

Estate in Reversion Not Sold.— Assuming that after the confiscation proceedings he held only the naked fee without the power of alienation, the amnesty and pardon proclamation of the President of Dec. 25, 1868, before the proceedings to condemn, removed his disability in this particular, and restored to him the right to make such use of the remainder as he saw fit.

U. S. v. Dunnington, (1892) 146 U. S. 350.

5. On Sentence by Court-martial — Not Reinstated After Dismissal.— The President, in virtue of his constitutional power to pardon offenses, may remit the penalties inflicted by sentence of court-martial, though he cannot reinstate the officer after the sentence has been carried into effect.

Vanderslice v. U. S., (1884) 19 Ct. Cl. 481.

While a judgment entered by the President approving the sentence of a court-martial dismissing an officer from the service is, after it

has been executed, irrevocable, he may remove the guilt of the dismissed officer by pardon. *President's Approval of Sentence of Court-Martial*, (1864) 11 Op. Atty.-Gen. 19.

Restoration of Officer's Rank After Reduction.— Where a captain in the army has been sentenced by a court-martial to reduction in rank by having his name placed lower down on the list of officers of the same grade, a remission of penalty by the President in the exercise of his pardoning power will have the effect of restoring the officer to his former relative rank and position on the roll. The case of an officer who has been thus reduced in rank differs essentially from that of an officer who has been dismissed from service by sentence of a military court. After such sentence is duly confirmed and executed the dismissed officer cannot be reinstated by means of a pardon, or in any other manner than by a new appointment and confirmation by the Senate.

Effect of President's Pardon, (1869) 12 Op. Atty.-Gen. 547.

The appointment of an officer of the marine corps to a new commission is constructive pardon of a previous sentence pronounced but not yet executed. *Court Martial—Pardon*, (1853) 6 Op. Atty.-Gen. 123.

The legal appointment of a passed midshipman, under sentence of suspension and on

half pay, to the office of lieutenant in the navy, is an implicit pardon of the sentence. *Effect of Promotion of Suspended Passed Midshipman*, (1842) 4 Op. Atty.-Gen. 8.

The order of the secretary of the navy to an officer, while under sentence of suspension, to attend a court-martial as a witness, does not operate as a constructive pardon. *Constructive Pardon*, (1854) 6 Op. Atty.-Gen. 714.

Forfeited Pay.— An order of the President revoking his own approval of the sentence of a court-martial may operate as a pardon, but does not reinvest in the officer a right to forfeited pay. That right became vested in the government, and its restoration is beyond the scope of the pardoning power.

Vanderslice v. U. S., (1884) 19 Ct. Cl. 481.

6. Removal of Disability to Testify.— A full and unconditional pardon removes the disability to testify consequent upon a judgment of conviction.

Boyd v. U. S., (1892) 142 U. S. 453.

A person who has served out a sentence on conviction of felony may be restored by pardon to competency as a witness, but the

jury is the sole judge of the credit to be given to his testimony. *U. S. v. Jones*, (U. S. Cir. Ct. 1824) 2 *Wheel. Crim. (N. Y.)* 451, 26 Fed. Cas. No. 15,493.

7. Remitting Consequences of Official Derelictions.— After pardon by the executive, remitting the legal consequences of the official derelictions of a revenue officer, no suit can be maintained against him or his sureties for those derelictions. All the remedies of the government against him, both on his bond and by indictment, are released, and he stands purged of his offense as fully as if the offense had not been committed.

U. S. v. Cullerton, (1878) 8 Biss. (U. S.) 166, 25 Fed. Cas. No. 14,899.

8. Disabilities Imposed by State Law.— The President has no power by a supplemental or special pardon to relieve a federal convict of legal or political disabilities imposed on such convict by the laws of one of the states.

Pardons, (1856) 7 Op. Atty.-Gen. 760. See also Effect of Pardons, (1857) 8 Op. Atty.-Gen. 284.

IX. POWER TO REVOKE PARDON.— The power of pardon is conferred by the Constitution upon the office of President, and the President has the right to arrest the pardon before it is delivered to the grantee, and his successor in the office of President has the same right in that respect.

Matter of De Puy, (1869) 3 Ben. (U. S.) 307, 7 Fed. Cas. No. 3,814.

ARTICLE II., SECTION 2.

"The President * * * shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur."

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I. ADVICE AND CONSENT OF THE SENATE — 1. In General. — The Senate not having advised and consented to a so-called treaty, it has no legal force.

In re Sutherland, (1892) 53 Fed. Rep. 551.

2. Separate Resolution by Senate upon Ratifying Treaty. — A treaty must contain the whole contract between the parties, and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it

may refuse its ratification or make it conditional upon the adoption of amendments to the treaty.

Fourteen Diamond Rings *v.* U. S., (1901) 183 U. S. 183, holding that a resolution adopted by the Senate upon ratifying a treaty is not operative as an amendment to the

treaty, when it has not received the assent of the President and the other party to the treaty. See also *New York Indians v. U. S.*, (1898) 170 U. S. 23.

II. EXTENT OF TREATY-MAKING POWER — 1. In General. — The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Geofroy v. Riggs, (1890) 133 U. S. 266. See also *In re Tiburcio Parrott*, (1880) 1 Fed. Rep. 508.

The Constitution having given to the President and Senate the right to make treaties, without limitation in words, there is no other limitation but their discretion, except that the treaty shall not contravene the Constitution or invade the rights of other departments. *Santos's Case*, (1835) 2 Brock. (U. S.) 493, 7 Fed. Cas. No. 4,016.

Police power of states. — An attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the times and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police of the several states, regarded as separate governments, is not a subject-matter to which the treaty-making power extends. And it is not pretended that the treaties which admit liquors, the manufacture of other countries, into this, on the most favorable terms, con-

tain any stipulations which purport to limit the legislation of the several states, after the import has taken the character of property within a state, the act of importation being fully accomplished and perfected. Nothing of that kind, it is believed, has been or will be attempted by the government of the United States. *Pierce v. State*, (1843) 13 N. H. 576.

Federalist. — The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive. Hamilton, in *The Federalist*, No. LXXV.

2. Over Foreign Extradition — a. IN GENERAL. — The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty, and which are consistent with the nature of our institutions and the distribution of powers between the general and state governments. And without attempting to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it, it may safely be assumed that the recognition

and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government. And as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced, when it demands the surrender of any one charged with offenses against it.

Per Taney, C. J., in Holmes v. Jennison, (1840) 14 Pet. (U. S.) 569.

b. NO RIGHT TO EXTRADITION APART FROM TREATY. — A foreign government has no right, by the law of nations, to demand of the government of the United States a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence without, and can only be secured by, a treaty stipulation.

Santos's Case, (1835) 2 Brock. (U. S.) 493, 7 Fed. Cas. No. 4,016. See also Es p. McCabe, (1891) 46 Fed. Rep. 373.

It seems that upon principles of international law, and independent of some statutory

provisions or treaty stipulations, courts of justice are neither bound nor authorized to remand persons for trial to a foreign government whose laws they are supposed to have violated. *U. S. v. Davis, (1837) 2 Sumn. (U. S.) 482, 25 Fed. Cas. No. 14,932.*

c. LIMITED TO ENUMERATED OFFENSES. — A treaty is not only a contract between the governments entering into it, but by virtue of Article VI. of the Constitution it is also the supreme law of the land. When a treaty contains an explicit enumeration of the offenses for which persons may be extradited under it, by a necessary implication the person surrendered under it is only allowed and held within the jurisdiction of the receiving government for the purpose of a trial on the charge specified in the warrant of extradition. For the latter government to detain such person for trial on any other charge would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights.

Es p. Hibbs, (1886) 26 Fed. Rep. 431.

d. MATTERS OF JUDICIAL INQUIRY. — Whether the government is bound by the treaty compact to deliver up the accused for offenses committed in another country which are not crimes by our laws, whether he is within the description of persons named in the treaty as subject to extradition, whether the treaty went into operation and became obligatory from its date or only from its ratification by assent of the Senate or other period posterior to the date, and finally whether the obligations assumed by the treaty will be fulfilled or not, are conditions addressed to the political department of the government. Over these questions the judiciary has no immediate control or jurisdiction.

In re Metzger, (1847) 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511, wherein the court further said: "The provision demanding the apprehension and commitment of persons charged with crimes cannot be carried into

effect in this country, but by aid of judicial authority. Not only in the distribution of the powers of our government does it appertain to that branch to receive evidence and determine upon its sufficiency to arrest

and commit for criminal offenses, but the prohibition of the Constitution against issuing a warrant to seize any person except on probable cause first proved necessarily imports that issuing such warrant is a judicial act. * * * It is believed this doctrine is firmly established in the jurisprudence of this country and England, in respect to the surrender of fugitives from justice, whether the obligation to surrender is deduced from the law of nations or is recognized only when expressly stipulated by treaty. * * * It seems to be regarded as an elementary principle that the extradition is to be effectuated through the agency of the tribunals of justice whose province it

is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify putting the accused upon his trial." See also Santos's Case, (1835) 2 Brock. (U. S.) 493, 7 Fed. Cas. No. 4,016.

When a treaty embraces a provision requiring the investigation of charges of crime and the arrest and imprisonment of the accused as for trial, it drops the character of a contract merely, and assumes that of a municipal law addressed to the civil magistrates. *In re Metzger*, (1847) 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

c. NOT A SUBJECT OF NEGOTIATION BY A STATE — Even in the absence of treaties or Acts of Congress on the subject the extradition of a fugitive from justice cannot become the subject of negotiation between a state of this Union and a foreign government.

U. S. v. Rauscher, (1886) 119 U. S. 414. See also *People v. Curtis*, (1872) 50 N. Y. 321.

Affirmative grants of power to the general government have been held not to be inconsistent with the exercise of the same powers by the states while the power remains dormant in the hands of the United States. "This principle is, no doubt, the true one, in relation to the grants of power, to which it is applied in the case above mentioned of *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 196. For example, the grant of power to Congress to establish 'uniform laws on the subject of bankruptcies throughout the United States,' does not of itself carry with it an implied prohibition to the states to exercise the same powers. But in the same case of *Sturges v. Crowninshield*, (1819) 4 Wheat. (U. S.) 196, another principle is stated, which is equally sound, and which is directly applicable to the point before us; that is to say, that it never has been supposed that the concurrent power of state legislation extended to every possible case in which its exercise had not been prohibited. And that whenever 'the terms in which a power is granted to Congress or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it.' This is the character of the power in question. From its nature, it can never be dormant in the hands of the general government. The argument which supposes this power may be dormant in the hands of the federal government is founded, we think, in a mistake as to its true nature

and character. It is not the mere power to deliver up fugitives from other nations upon demand; but the right to determine whether they ought or ought not to be delivered, and to make that decision, whatever it may be, effectual. It is the power to determine whether it is the interest of the United States to enter into treaties with foreign nations generally, or with any particular foreign nations, for the mutual delivery of offenders fleeing from punishment from either country; or whether it is the interest and true policy of the United States to abstain altogether from such engagements, and to refuse, in all cases, to surrender them." *Holmes v. Jennison*, (1840) 14 Pet. (U. S.) 576.

Prohibition on the states. — The power to make treaties is not only general in terms without any express limitation, but it is accompanied with an absolute prohibition of the exercise of the treaty power by the states; that is, in the matter of foreign negotiations, the states have conferred the whole of their power, in other words, all the treaty powers of sovereignty, on the United States. *Droit d'Aubaine*, (1857) 8 Op. Atty-Gen. 415. See art. I., sec. 10, "No state shall enter into any treaty, alliance, or confederation," 8 FED. STAT. ANNOT. 713.

As to interstate extradition, see *infra*, p. 184, art. IV., sec. 2, providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

3. To Acquire Territory — **a. IN GENERAL.** — The United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace, and for that purpose has the power of other sovereign nations.

Dorr v. U. S., (1904) 195 U. S. 140. See also *Nelson v. U. S.*, (1887) 30 Fed. Rep. 115.

The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory either by conquest or by

treaty. *American Ins. Co. v. 356 Bales Cotton*, (1828) 1 Pet. (U. S.) 541.

This power necessarily implies the right to purchase new territory; and when the power has been exercised, and territory purchased, the title, immediately upon an exchange of ratification, vested in the United States. *U. S. v. Nelson*, (1886) 29 Fed. Rep. 204.

b. POWER TO PRESCRIBE STATUS OF INHABITANTS OF ACQUIRED TERRITORY.

—The power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants and what their status shall be.

Downes v. Bidwell, (1901) 182 U. S. 279.

c. AUTHORITY OF CONGRESS OVER TERRITORY FREED FROM FOREIGN COUNTRY. — When the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquillity in all its borders and until the people of Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty, under international law and pending the pacification of the island, to protect in all appropriate legal modes the lives, the liberty, and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the Treaty of Paris, and the Act of June 6, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I. of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.

Neely v. Henkel, (1901) 180 U. S. 121.

4. To Provide for Exercise of Judicial Authority Abroad. — The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

In re Ross, (1891) 140 U. S. 463.

Establishing tribunals for American citizens abroad. — An Act of Congress giving effect to a treaty providing for the adjust-

ment of civil controversies of American citizens arising in the country with which the treaty was made is valid. *Forbes v. Scannell*, (1859) 13 Cal. 281.

5. To Abolish Disabilities of Aliens. — The residence of citizens of one country within the territory of another, and the removal of their disability from alienage to hold, transfer, and inherit property, are proper subjects of treaty arrangement.

Geofroy v. Riggs, (1890) 133 U. S. 266. See also *U. S. v. Forty-three Gallons Whiskey*, (1876) 93 U. S. 197; *People v. Gerke*, (1855) 5 Cal. 384; *Wunderle v. Wunderle*, (1893) 144 Ill. 40; *Opel v. Shoup*, (1896) 100 Iowa 424; *Droit d'Aubaine*, (1857) 8 Op. Atty.-Gen. 411.

Conditions on which aliens may reside.—If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and also who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. *In re Tiburcio Parrott*, (1880) 1 Fed. Rep. 508.

To purchase land.—A treaty with a foreign country which gives to the citizens of that country the right to purchase and hold land in the United States, and removes the incapacity of alienage, places the parties in precisely the same situation as if they were

citizens of this country. *Chirac v. Chirac*, (1817) 2 Wheat. (U. S.) 259.

To inherit land.—It is within the power of the United States, by treaty, to remedy the disability of aliens to inherit real estate within the several states. *Bahuaud v. Bize*, (1901) 105 Fed. Rep. 485. See also *Geofroy v. Riggs*, (1890) 133 U. S. 268; *Hauenstein v. Lynham*, (1879) 100 U. S. 483, saying that the treaty-making clause is retroactive as well as prospective.

A treaty with France, providing in case of the death of any citizen of France in the United States, without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs, was within the treaty-making power, and the placing of a delegate before the court as representing absent heirs precludes the appointment of any attorney to represent them. *Rabasse's Succession*, (1895) 47 La. Ann. 1452.

6. To Regulate Fisheries.—The United States has power to enter into treaty stipulations for the regulation of fisheries along an international boundary. The regulation of fisheries in navigable waters within the territorial limits of the several states, in the absence of federal treaty, is a subject of state rather than of federal jurisdiction.

Treaties — Fisheries, (1898) 22 Op. Atty.-Gen. 214.

7. With the Indian Tribes.—The power to make treaties with the Indian tribes is coextensive with the power to make treaties with foreign nations.

U. S. v. Forty-three Gallons Whiskey, (1876) 93 U. S. 197.

To make treaties with Indian tribes is a power conferred by this clause. Inasmuch as the power is given in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the states and the United States. *Holden v. Joy*, (1872) 17 Wall. (U. S.) 242.

When the national or tribal relation of Indians has been established by the political departments the courts are bound by it. *Graham v. U. S.*, (1895) 30 Ct. Cl. 333.

Issuing bonds under treaties with Indians.—An engagement to pay money is certainly within the provision of the treaty-making power, and such an engagement is not carried beyond that province by the circumstance that it provides for issuing, through the agency of a particular officer, an obligation to pay money at a particular time; for such, in effect, is a bond, and the secretary of the treasury may execute a treaty that stipulates for the issuing of bonds. *Choctaw Indians*, (1870) 13 Op. Atty.-Gen. 358.

Grants of land.—By this power the President and Senate of the United States can make a treaty with any Indian tribe, extending to all objects which, in the intercourse of nations, have usually been regarded as the proper subject of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the states and the United States. This treaty-making power can make a sale or grant of land without an Act of Congress. It can lawfully provide that a patent shall issue to convey lands which belong to the United States, without the consent of Congress, and in such case the grantee will have a good title. *U. S. v. Reese*, (1879) 5 Dill. (U. S.) 405, 27 Fed. Cas. No. 16,137.

The penal legislation of Congress may constitutionally be extended to embrace Indians in the Indian country by the mere force of a treaty, whenever it operates of itself, without the aid of any legislative provision. *Exp. Crow Dog*, (1883) 109 U. S. 567.

Authority of Congress to legislate.—“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral

obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, Chinese Exclusion Case, (1889) 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas v. Gay*, (1898) 169 U. S. 264, 270; *Ward v. Race Horse*, (1896) 163 U. S. 504, 511; *Spalding v. Chandler*, (1896) 160 U. S. 394, 405; *Missouri, etc., R. Co. v. Roberts*, (1894) 152 U. S. 114, 117; *The Cherokee Tobacco*, (1870) 11 Wall. (U. S.) 616. The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country, and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In *U. S. v. Kagama*, (1886) 118 U. S.

375, speaking of the Indians, the court said (382): "After an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by Acts of Congress. This is seen in the Act of March 3, 1871, embodied in sec. 2079 of the Revised Statutes: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.'" Lone Wolf v. Hitchcock, (1903) 187 U. S. 553. See sec. 2079, R. S., 3 FED. STAT. ANNOT. 357.

Conclusive on the courts.—When a treaty has been made by the proper federal authority, and ratified, it becomes the law of the land, and the courts have no power to question, or in any manner look into, the power or rights of the nation or tribe with whom it is made. The action of the treaty-making power is conclusive upon such inquiry. *Maiden v. Ingersoll*, (1859) 6 Mich. 376.

III. AUTHORITY OF CONGRESS — 1. To Abrogate a Treaty.—Congress, by legislation, and so far as the people and authorities of the United States are concerned, can abrogate a treaty made between this country and another country which has been negotiated by the President and approved by the Senate.

La Abra Silver Min. Co. v. U. S., (1899) 175 U. S. 460. See also *Head Money Cases*, (1884) 112 U. S. 580, 599; *Whitney v. Robertson*, (1888) 124 U. S. 190, 194; *Chinese Exclusion Case*, (1889) 130 U. S. 581, 600; *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 698, 721. See also *infra*, art. VI., providing that "this Constitution, and the laws of

the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

2. Need of Legislation to Give Effect to Treaties.—Treaties made between the United States and foreign powers often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the Senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfil all the obligations of treaties.

Prigg v. Pennsylvania, (1842) 16 Pet. (U. S.) 619.

"The principle thus stated has been generally accepted as a true interpretation of the constitutional provisions relating to the subject of treaties. It establishes that there is a class of treaties which, without legislation, does not become self-executing as a rule of municipal law. A statement is given of such provisions of treaties as come within this class; as when the terms of the stipulation

import a contract, when either of the parties engages to perform a particular act. But the decision does not enumerate or define the limitations of the whole class. In the treaty-making power conferred on the President the implication exists that the power is to be exercised by him, subject to the limitation of the Constitution. If, in time of peace, he should provide by the stipulations of a treaty for the quartering of soldiers in any house without the consent of the owner, such a stipulation would be simply void, because

forbidden by the Constitution to every department of the government. But where the government of the United States has power under the Constitution over a subject, although that power may be vested by the Constitution exclusively in Congress, it has been claimed that in the making of treaties such power may be exercised by the President, by and with the advice and consent of the Senate, without the co-operation of the House of Representatives or Act of Congress." *Caveats for Patents for Inventions*, (1889) 19 Op. Atty-Gen. 276.

A treaty, though it be as such a provision of the supreme law of the land, yet may require the enactment of a statute to regu-

late the details of a process or of the right embraced in its stipulation, but such necessity for its existence does not affect the question of the legal force of the treaty *per se*. *Copyright Convention with Great Britain*, (1854) 6 Op. Atty-Gen. 293.

No enabling Act of Congress is requisite in the premises. — Whether, when a treaty has been duly made and ratified, there is need or not of an Act of Congress to give effect to any of its stipulations, is another matter, and wholly irrelevant to the question of the power to make a treaty. That undeniably belongs to the President and Senate. *Ambassadors and Other Public Ministers of U. S.*, (1855) 7 Op. Atty-Gen. 196.

3. Without Authority to Nullify Titles Confirmed by Treaty.— Congress is bound to regard the public treaties, and it has no power to organize a board of revision to nullify titles confirmed many years before by the authorized agents of the government.

Reichart v. Felps, (1867) 6 Wall. (U. S.) 165.

4. Postal Conventions with Foreign Countries.— From the foundation of the government to the present day, the Constitution has been interpreted to mean that the power vested in the President to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the postmaster-general power to conclude conventions with foreign governments for the cheaper, safer, and more convenient carriage of foreign mails. The existence of such a power in Congress may, perhaps, be worked out from the authority given to that body in the seventh clause of section 8, Article I., of the Constitution, to establish post-offices and post-roads. This has always been construed to mean the power to organize and carry on the post-office department.

Postal Conventions with Foreign Countries, (1890) 19 Op. Atty-Gen. 520.

IV. AUTHORITY OF OTHER PARTY TO RATIFY TREATY.— A court is not authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to make the engagements into which he entered.

Doe v. Braden, (1853) 16 How. (U. S.) 657.

V. TREATY INURES TO SUCCESSORS OF SOVEREIGN.— A treaty with a sovereign as such inures to his successors in the government of the country.

The Sapphire, (1870) 11 Wall. (U. S.) 168.

VI. TIME TREATY TAKES EFFECT.— A treaty is to be regarded as taking effect from its date, unless a different period is fixed by the contracting parties, or must be adopted in order to fulfil their manifest intention. It must necessarily be, in effect, a question of intention, and the public law, the same as municipal, implies the intention of the parties to be, when not defined by themselves, that these contracts shall have effect from the time of their execution.

In re Metzger, (1847) 5 N. Y. Leg. Obs. 23, 17 Fed. Cas. No. 9,511.

VII. SUSPENSION OF TREATIES BY WAR. — Treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the recurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

Society, etc., v. New Haven, (1823) 8 Wheat. (U. S.) 494.

VIII. TEMPORARY CONVENTION RESPECTING BOUNDARY.

A convention entered into between the United States and Great Britain as to the boundary line between the United States and the British possessions adjoining the Territory of Washington, was not a treaty within the meaning of the Constitution, and, as a treaty, the supreme law of the land, conclusive on the court, but was a provisional arrangement rendered necessary by national

differences involving the faith of the nation and entitled to the respect of the court. The power to make and enforce such a temporary convention respecting its own territory is a necessary incident to every national government and inheres where the executive power is vested. *Watts v. U. S.*, (1870) 1 Wash. Ter. 294.

ARTICLE II., SECTION 2.

"The President * * * shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

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1. "BY AND WITH THE ADVICE AND CONSENT OF THE SENATE" — 1. In General. — The appointment of all officers of the United States belongs to the President, by and with the advice and consent of the Senate, where an appointment thereof is not otherwise provided for in the Constitution itself or by legislative enactment.

Assistant Collector at New York, (1885) 18 Op. Atty.-Gen. 98. See also Appointments in Treasury Department, (1875) 15 Op. Atty.-Gen. 3.

2. To Fill Vacancy Created by Dismissal by President. — The dismissal of an officer of the army by the President creates a vacancy which can be filled only by a new and original appointment, to which, by the Constitution, the advice and consent of the Senate are necessary; unless the vacancy occurs in the recess of that body, in which case the President can grant a commission to expire at the end of its next succeeding session.

U. S. v. Corson, (1885) 114 U. S. 619.

3. Restoration of Dismissed Officer. — An officer once entirely severed from the army by the constitutional action of the President, and more particularly if the place has been filled by a new appointment confirmed by the Senate, cannot afterwards be restored to his former position by any action of the President alone.

Montgomery v. U. S., (1884) 19 Ct. Cl. 375. See also Bennett v. U. S., (1884) 19 Ct. Cl. 379; Palen v. U. S., (1884) 19 Ct. Cl. 389; Vanderslice v. U. S., (1884) 19 Ct. Cl. 481. See also Corson's Case, (1881) 17 Ct. Cl. 344.

The power to restore an officer by appointment and commission to lost rank in the army or navy is one plainly within the competency and discretion of the President, by and with the advice and consent of the Senate. Navy Efficiency Act, (1856) 8 Op. Atty.-Gen. 223.

A sentence and dismissal from service approved by the President cannot be annulled. — The officer dismissed can be restored only by a new nomination by the President, confirmation by the Senate and all the requisites to constitute an original appointment to office. Sentences of Courts Martial, (1843) 4 Op. Atty.-Gen. 274.

Where the President is authorized by law to reinstate a discharged army officer, he may do so without the advice and consent of the Senate. Collins's Case, (1879) 15 Ct. Cl. 22, reaffirming (1878) 14 Ct. Cl. 568.

4. Restoration After Acceptance of Resignation. — When a resignation has been accepted, the officer ceases to hold the office, and nothing can reinstate him short of a new nomination and confirmation, when the office is one of the kind to which a nomination and confirmation by the Senate are necessary.

Mimmack v. U. S., (1878) 97 U. S. 437.

5. Power of Senate Limited to Affirmation or Rejection. — The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limitations to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualification or alteration.

Power of Senate Respecting Nominations to Office, (1837) 3 Op. Atty.-Gen. 188.

6. Upon Increase of Duties of the Office. — When additional duties are devolved upon officers by an Act of Congress germane to the offices already held

by them, it is not necessary that they should be again appointed by the President and confirmed by the Senate. Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Shoemaker v. U. S., (1893) 147 U. S. 301.

7. Appointments by President Confirmed by Statute.—When the President made appointments before the passage of any law authorizing them, and subsequently made known the fact to Congress, and by Act of Congress the appointments theretofore made were confirmed, it was not necessary that the persons so appointed by the President and confirmed by statute should be again nominated to the Senate for its advice and consent.

Chaplains for Army Hospitals, (1863) 10 Op. Atty.-Gen. 449.

8. Ineligible at Time of Nomination and Confirmation.—The nomination and confirmation of a person who at the time is ineligible for the office by force of Article I., section 6, cannot be made the basis of his appointment to such office after such ineligibility ceases.

Appointment to Civil Office, (1883) 17 Op. Atty.-Gen. 522.

II. AMBASSADORS, PUBLIC MINISTERS, AND CONSULS.—The President has power by the Constitution to appoint diplomatic agents of the United States of any rank, at any place, and at any time, in his discretion, subject always to the constitutional conditions of relation to the Senate. The power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from nor limited by Congress, but requiring only the ultimate concurrence of the Senate.

Ambassadors and Other Public Ministers of U. S., (1855) 7 Op. Atty.-Gen. 186, wherein the attorney-general said that these words are descriptive of a class existing by the law of nations, and they comprehend all which the class comprehends. Ambassador, public minister, signifies all forms or denominations of persons employable as intermediaries between our own and any other government. Any such intermediary, according to the wants of the public service, may be appointed and commissioned by the conjoint executive power of the United States; and the Presi-

dent may negotiate a treaty through the intervention of a person not commissioned, or intended to be commissioned, on a nomination to the Senate.

Consuls are officers created by the Constitution and the laws of nations, not by Acts of Congress, and it belongs exclusively to the President, by and with the advice and consent of the Senate, to appoint consular officers to such places as he and they deem to be meet. *Appointment of Consuls*, (1855) 7 Op. Atty.-Gen. 242.

Appointment of Inferior Consular Officers.—The claim that Congress is without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although Article II., section 2, of the Constitution, requires consuls to be appointed by the President "by and with the advice and consent of the Senate," the word "consul" therein does not embrace a subordinate and temporary officer like that of vice-consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same

section, saying, "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

U. S. v. Eaton, (1898) 169 U. S. 343.

Congress may by law vest the appointment of inferior consular officers in the President alone or in the secretary of state. Appointment of Consuls, (1855) 7 Op. Atty-Gen. 242.

In the absence of a statute prescribing the appointment of vice-consuls, they can only be appointed with the advice and consent of the Senate. *Dainese's Case*, (1879) 15 Ct. Cl. 64.

III. WHO ARE OFFICERS OF THE UNITED STATES — 1. In General. — Unless a person in the service of the government holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

U. S. v. Mouat, (1888) 124 U. S. 307. See also U. S. v. Smith, (1888) 124 U. S. 532.

There is no doubt but that all persons thus appointed are officers of the United States of the highest and most pronounced type, but other persons in the employment of the government and not so appointed are, by statutes and departmental regulations, in some cases

called and recognized as also officers. The word is frequently used in a broader sense than the technical one fixed by the constitutional method of appointment, and that use of it is occasionally found in statutes, in opinions of the Supreme and other courts, and in the regulations and orders of the navy department. *Hendee v. U. S.*, (1887) 22 Ct. Cl. 140.

An Office Is a Public Station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

U. S. v. Hartwell, (1867) 6 Wall. (U. S.) 393.

If a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties appertaining

to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer. *U. S. v. Maurice*, (1823) 2 Brock. (U. S.) 96, 26 Fed. Cas. No. 15,747.

2. Who Are "Inferior" Officers. — The word "inferior" is not used in the sense of petty or unimportant, but means subordinate or inferior to those officers in whom, respectively, the power of appointment may be vested.

Collins's Case, (1878) 14 Ct. Cl. 569, where the court said: "It would be impossible to define, except arbitrarily, the meaning of the words 'inferior officers,' in their application to officers of the different branches of the public service who have no official relation to each other, and it would not be easy to separate all the officers of the government into two classes and draw a satisfactory line which would divide the inferior, in the sense in which it is claimed that word is used, from those of the higher class, nor is it necessary to attempt to do either. In our opinion, the words as used in connection with the other language of the same clause have a plain, definite, and intelligible meaning, capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls, and judges of the Supreme Court who shall be nominated by the Presi-

dent and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them respectively, whenever Congress thinks proper so to do. Thus it may authorize the President or the head of the war department to appoint an army officer, because the officer to be appointed is inferior to the one thus vested with the appointing power. The word 'inferior' is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested — the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested — the President, the courts of law, and the heads of departments."

3. Master in Chancery.— A master in chancery is an officer of the United States.

Northwestern Mut. L. Ins. Co. v. Quinn, (1895) 69 Fed. Rep. 462; Thomas v. Chicago, etc., R. Co., (1889) 37 Fed. Rep. 548.

4. Chaplain of Army Hospital.— Chaplains of army hospitals are inferior officers.

Chaplains for Army Hospitals, (1863) 10*Op. Atty.-Gen. 449.

5. Pension Surgeon.— A surgeon appointed by the commissioner of pensions under section 4777, R. S., to make the periodical examinations of pensioners, and to examine applicants for pensions, is not an officer within the meaning of this clause. The duties are not continuing and permanent, but are occasional and intermittent. The surgeon is only to act when called on by the commissioner of pensions in some special case, as when some pensioner or claimant presents himself for examination.

U. S. v. Germaine, (1878) 99 U. S. 512.

6. Cashier of the Mint.— A cashier of the mint appointed by the superintendent of the mint, under section 3504, R. S., was held not to be an officer of the United States under the provisions of the Constitution, and therefore not one of the persons under whose control or in whose custody money or bullion may be placed under the provisions of section 3506.

U. S. v. Cole, (1904) 130 Fed. Rep. 614.

7. Customs Merchant Appraiser.— A merchant appraiser selected in accordance with the provisions of a customs Act and treasury regulations adopted thereunder, upon the request of an importer for a reappraisal, is not an officer of the United States required to be appointed by the President, or a court of law, or the head of a department. He is selected as an expert for the special case, and his position is without tenure, duration, continuing emolument, or continuous duties, and therefore he is not an officer within the meaning of the Constitution.

Auffmordt v. Hedden, (1890) 137 U. S. 326.

8. Customs Clerk.— Clerks appointed by a collector of customs, to a number limited by the secretary of the treasury, the appointment not requiring the approval of the secretary, are not officers of the United States in the sense of the Constitution.

U. S. v. Smith, (1888) 124 U. S. 532.

9. Assistant Assessor.— An Act of Congress providing for the appointment of assistant assessors of internal revenue by assessors is unconstitutional, as such persons are officers.

Appointment of Assistant Assessors of Internal Revenue, (1865) 11 Op. Atty.-Gen. 213.

10. Special Agent of General Land Office.— The position of special agent of the general land office has not been made an office so as to constitute the

incumbent an officer of the government within the meaning of the Constitution, but is a mere agency or employment.

U. S. v. Schlierholz, (1904) 133 Fed. Rep. 333.

11. Letter Carrier. — Letter carriers appointed by the postmaster-general under authority of Acts of Congress, practically during good behavior, who are sworn and give bond for the faithful performance of their duties, are paid from moneys appropriated for the purpose by Congress with salaries fixed by law, and have regularly prescribed services to perform, are officers of the United States.

U. S. v. McCrory, (C. C. A. 1899) 91 Fed. Rep. 296.

12. State Officer Issuing Federal Process. — Section 33 of the Judiciary Act of 1789, which empowered justices of the peace' and other officers therein named to arrest and commit, or bail, as the case may require, persons charged with a violation of the criminal law of the United States, does not make such persons federal officers within the meaning of this clause.

Ex p. Gist, (1855) 26 Ala. 156.

IV. "APPOINTMENTS NOT HEREIN OTHERWISE PROVIDED FOR." — When Congress creates inferior offices and omits to provide for appointments to them, or provides in an unconstitutional way for such appointments, the officers are within the meaning of the Constitution "officers of the United States whose appointments are not" therein "otherwise provided for," and the power of appointing such officers devolves on the President.

Appointment of Assistant Assessors of Internal Revenue, (1865) 11 Op. Atty.-Gen. 213.

When a statute does not specify how an officer is to be appointed, it must be by the President, by and with the advice and consent of the Senate. Civil Service Commission — Chief Examiner, (1886) 18 Op. Atty.-Gen. 409. See also Civil-Service Bill, (1883) 17 Op. Atty.-Gen. 504; Appointment of Assistant Secretary of State, (1853) 6 Op. Atty.-Gen. 1.

The appointment of the register of wills for the District of Columbia is with the President, by and with the advice and consent of the Senate, there being no other provision by law for his appointment. Register of Wills for District of Columbia, (1871) 13 Op. Atty.-Gen. 410.

Commissioner appointed pursuant to treaty. — A commissioner appointed under the convention of Feb. 8, 1896, concerning claims growing out of seizures of vessels in Behring Sea, is not an incumbent of an office established by law in the sense of the Constitution, neither is he within the clause "ambassadors, other public ministers and consuls." The commissionership is an office or employment emanating from the general treaty-making power and created by it in Great Britain, and is not governed by the statute providing that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereafter specially authorized thereto by law." Office — Compensation, (1898) 22 Op. Atty.-Gen. 184.

V. POWER OF CONGRESS — 1. To Control Appointment of Constitutional Officers. — The power to appoint diplomatic agents of any rank or title at any time or place is vested in the executive alone by the Constitution. Upon the exercise of this power Congress can place no limitation. But the power to provide for the compensation of diplomatic officers is vested in the legislative branch alone, and it may fix or limit the amount.

Foot v. U. S., (1888) 23 Ct. Cl. 443.

Control of appropriations for salaries. — A provision in an Act of Congress, that "the

President shall appoint no other than citizens of the United States, who are residents thereof, or abroad in the employment of the government at the time of their appoint-

ment," like other statutory provisions assuming to control the executive in the matter of appointing diplomatic officers, must be deemed directory or recommendatory only, and not mandatory. "The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category, but the President may, in my judgment, employ him, if the public interest requires it, whether he be a citizen or not, and whether or not at the time of appointment he be actually within the United States." *Ambassadors and Other Public Ministers of U. S.*, (1855) 7 Op. Atty-Gen. 215.

"It has been claimed by the executive, in accordance with the opinion of Attorney-General Cushing, that by the Constitution to the executive alone is granted the power to appoint diplomatic agents of any rank or title, at any time, and at any place, and upon the exercise of this power Congress can place no extension or limitation, by undertaking either to create, abolish, or change the character, title, or rank of officers. On the other hand, to the legislative branch of the govern-

ment alone is granted the power to provide for the compensation of those as well as of all other public officers, and this it may do in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so. During the whole of the administration of President Jefferson, and part of the terms of other early Presidents, Congress annually appropriated a sum in gross 'for the expenses of intercourse with foreign nations,' leaving it to the executive to fix the salaries of its several appointees. In some cases appropriations have been made for particular officers not to exceed the sums named, still leaving to the executive a discretion to determine the amounts to be paid. (7 Op. Atty-Gen. 186.) When Congress, by inadvertence or otherwise, has used language in legislative enactments which appeared to encroach upon the constitutional prerogative claimed by the executive in the establishment of diplomatic agents abroad, it has, once at least, been met with dignified expressions of exception or protest, while the wishes of Congress, even thus expressed, have generally, perhaps always, been adopted and followed." *Byers v. U. S.*, (1887) 22 Ct. Cl. 63.

2. Non-constitutional Offices to Be Established by Law.—From this section the Constitution must be understood to declare that all offices of the United States, except in cases where the Constitution itself may otherwise provide, shall be established by law.

U. S. v. Maurice, (1823) 2 Brock. (U. S.) 96, 26 Fed. Cas. No. 15,747.

3. Power to Prescribe Qualifications and Conditions.—*a. APPOINTEE TO COMPLY WITH CONDITIONS PRESCRIBED BY STATUTE.*—When a person has been nominated to an office by the President and confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the executive; all that the executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions his title to enter on the possession of the office is also complete.

U. S. v. Le Baron, (1856) 19 How. (U. S.) 78.

b. ESTABLISHING CIVIL SERVICE COMMISSION.—Though the appointing power alone can designate an individual for an office, either Congress, by direct legislation, or the President, by authority derived by Congress, can prescribe qualifications, and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications; and it is not necessary that the judges in the tests should be chosen by the appointing power.

Civil-Service Commission, (1871) 13 Op. Atty.-Gen. 524, wherein the attorney-general said that Congress has the right to prescribe qualifications of persons to be appointed to offices, but the right "is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the other. An office cannot be created except under the condition that it shall be filled according to the constitutional rule;" and that Congress may prescribe qualifications for office. It can require that officers shall be of

American citizenship or of a certain age, that judges shall be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and to require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the government, would not impose an unconstitutional limitation on the appointing power. That power would still have a reasonable scope for its own judgment and will.

Acts of Congress establishing the Civil Service Commission are valid. *Matter of Miller*, (1887) 5 Mackey (D. C.) 512.

4. To Vest Appointments "in the Heads of Departments." — This clause is to be found in the article relating to the executive, and the word "departments" has reference to the subdivision of the power of the executive into departments, for the more convenient exercise of that power. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the departments of the treasury, interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus of those departments.

U. S. v. Germaine, (1878) 99 U. S. 511.

Appointment with approbation of head of department. — One appointed under an Act of Congress authorizing an assistant treasurer, with the approbation of the secretary of the treasury, to appoint a specified number of clerks, is appointed by the head of a department within the constitutional provision. *U. S. v. Hartwell*, (1867) 6 Wall. (U. S.) 393.

The commissioner of pensions is not the head of a department within the meaning of the Constitution. *U. S. v. Germaine*, (1878) 99 U. S. 511.

Appointments made by the comptroller of the currency, of receivers of national banks, as provided by Acts of Congress, are to be

presumed to be made with the concurrence or approval of the secretary of the treasury, and are made by the head of the department, within the meaning of the Constitution. *Price v. Abbott*, (1883) 17 Fed. Rep. 507.

A receiver of a national bank appointed by the comptroller of the currency, who is the chief officer of a bureau of the treasury department charged with the execution of all laws passed by Congress relating to the regulation and the issue of a national currency secured by United States bonds, is appointed by the head of a department within the meaning of the Constitution, as the comptroller performs this, as well as all other duties, under the general direction of the secretary of the treasury. *Frelinghuysen v. Baldwin*, (1882) 12 Fed. Rep. 396.

5. To Vest Appointments "in the Courts of Law." — Congress had the right to invest the District or Circuit Courts with the power of appointing commissioners.

Rice v. Ames, (1901) 180 U. S. 378.

Commissioners exercising quasi-judicial power. — The Act of Congress of March 2, 1867, entitled "An Act supplementary to the several Acts of Congress, abolishing imprisonment for debt," was held not to be unconstitutional as giving jurisdiction of proceed-

ings under the statute to a commissioner appointed by a Circuit Court, and so conferring the judicial power of the United States upon an officer not appointed by the President with the consent of the Senate. *Russell v. Thomas*, (1874) 10 Phila. (Pa.) 239, 31 Leg. Int. (Pa.) 189, 21 Fed. Cas. No. 12,162.

6. Selection of Appointing Power in Discretion of Congress. — It is no doubt usual and proper to vest the appointment of inferior officers in that department

of government, executive or judicial, or in that particular executive department, to which the duties of such officers appertain, but there is no absolute requirement to this effect in the Constitution. As the Constitution states, the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.

Ex p. Siebold, (1879) 100 U. S. 397.

The appointing power here designated was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of court properly belongs to the courts of law, and that a clerk is one of the inferior officers con-

templated by the provision in the Constitution cannot be questioned. In the exercise of the power here given Congress has declared that the Supreme Court and the District Courts shall have power to appoint clerks of their respective courts, and that the clerk for each District Court shall be clerk also of the Circuit Court in such district. *Ex p. Hennen*, (1839) 13 Pet. (U. S.) 258.

7. Power to Make Appointments.

Appointments to office can be made only by the executive branch of the government in the manner provided by the Constitution and not by Congressional enactment. *Wood's Case*, 15 Ct. Cl. 151, in which the court said: "By R. S. sec. 1094, officers on the retired list of the army compose part of the army of the United States, and, therefore, no one can be upon that list who is not an officer appointed as required by the Constitution, art. II., sec. 2. But being such officer, thus appointed, of any grade on the active list, he may be retired with a rank higher or lower than that which belongs to his office, whenever Congress sees fit so to provide. Congress cannot appoint him to a new and different office, because the Constitution vests the appointing power in the President with the advice

of the Senate, or in certain cases in the President alone, the heads of the executive departments, or the courts of law; but Congress may transfer him to the retired list, and may change his rank and pay at any time, without coming in conflict with that provision of the Constitution." *Affirmed* (1882) 107 U. S. 414.

An Act of Congress for the condemnation of land for public uses and creating a commission of five to select and appraise the value of the land, three of whom are to be appointed by the President, the other two being army officers specially designated by the Act itself, is not unconstitutional because of such designation. *U. S. v. Cooper*, (1891) 20 D. C. 116.

VI. NO APPOINTMENT WITHOUT COMMISSION. — The appointment of an officer by the President, by and with the advice and consent of the Senate, does not of itself confer the office. The President has, notwithstanding, a *locus penitentiæ*, and may withhold the commission, or the delivery of the commission to the officer.

Adams's Case, (1867) 12 Op. Atty-Gen. 306. See also *infra*, *May withhold commission after confirmation by Senate*, p. 54.

The power of appointment to office is essentially an executive function. It belongs essentially to the executive department rather than to the legislative or judicial. If no provision on the subject had been made by the Constitution, it would have been held appurtenant to the President as the head of the executive department, specially charged with the execution of the laws. Hence his power at all times to vacate offices and to fill vacancies. He can by his own act do everything

but give full title to his appointees, and invest them with right to hold during the official term. That he cannot do without the consent of the Senate, but such is his power over officers, that, after the Senate has consented to his nomination, or, in common parlance, has confirmed it, the nominee is not yet fully appointed, or even entitled to the office, for it still remains with the President to give him a commission or to refuse it, as he may deem best, and without the commission there is no appointment. *President's Power to Fill Vacancies in Recess of Senate*, (1866) 12 Op. Atty-Gen. 41.

VII. ANTEDATING APPOINTMENTS. — It is not competent for the President, with the concurrence of the Senate, to make an appointment as of a prior date, with pay from that date.

Reappointment of Chaplain Blake, (1881) 17 Op. Atty-Gen. 97.

The executive — the President alone, or the President with the advice and consent of

the Senate — by antedating the commission or appointment of a public officer, without legislative authority, cannot create a liability on the part of the United States to pay him a salary for the time he was not in service;

but Congress, the legislative branch of the government, may by law create such liability, and may allow back pay to any officer in consideration of past services or for any other cause which it deems sufficient. *Collins's Case*, (1879) 15 Ct. Cl. 34. See also *Bennett v. U. S.*, (1884) 19 Ct. Cl. 386.

Delayed issuing commission.—Where the President, following an executive practice

which existed at the time, did not issue a commission to a reappointed officer, but spread upon the records of the war department the proceedings of the Senate consenting to his reappointment, this must be regarded as an appointment to office, and a commission subsequently issued, as an executive confirmation of the act. *Bennett v. U. S.*, (1884) 19 Ct. Cl. 380.

VIII. COURTS HAVE NO SUPERVISING POWER.—The appointment to an official position in the government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant—whether or not he is the proper one to discharge the duties of the position; therefore it is one of those acts over which the courts have no general supervising power.

Keim v. U. S., (1900) 177 U. S. 293, *affirming* (1898) 33 Ct. Cl. 174.

IX. NO VESTED INTEREST IN AN OFFICE.—An officer appointed for a definite time or during good behavior has not any vested interest or contract right in his office of which Congress cannot deprive him. Whatever the form of the statute, the officer under it does not hold by contract, but enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation.

Crenshaw v. U. S., (1890) 134 U. S. 104.

X. POWER OF REMOVAL—1. Power of President to Remove.—In the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the Senate. To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and expressive language. It should not be held to be taken away by mere inference or implication.

Shurtleff v. U. S., (1903) 189 U. S. 314.

There is no doubt of the power of the President and Senate jointly to remove an officer when the tenure of the office was not fixed by the Constitution. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. *Ex p. Hennen*, (1839) 13 Pet. (U. S.) 258.

"The power of removal from office is an executive power, and is vested by the Constitution in the President solely." Trial of Andrew Johnson, 177.

Unless holding under the Constitution during good behavior.—The President has the constitutional power to remove civil officers appointed and commissioned by him, by and with the advice and consent of the Senate, where the Constitution has not otherwise provided by fixing the tenure during good behavior. Executive Authority to Remove Chief Justice of Minnesota, (1851). 5 Op.

Atty-Gen. 288, advising that the President was invested with authority to remove the chief justice of the Territory of Minnesota from office.

The President may dismiss a military or naval officer without the concurrence of the Senate. *McElrath's Case*, (1876) 12 Ct. Cl. 201, in which case, referring to *Ex p. Hennen*, (1839) 13 Pet. (U. S.) 230, the court said: "On this authority there are two distinct constitutional powers of removal: one vested in the President and Senate as incident to their power of appointment; the other vested in the President alone, as an attribute of the executive power belonging to his office. And as to this, and probably in consequence of the construction made, the form of commissions adopted for officers of the army and navy and marine corps would seem intended to prevent all question; for now the commissions run, 'for and during the pleasure of the President.' This no one can determine and declare but him-

self; and when he declares it the commission necessarily expires by the express terms of its limitation."

The President alone, in the absence of legislation, has no power to remove an incumbent whose appointment required the concurrent action of the President and the Senate. *U. S. v. Avery*, (1867) Deady (U. S.) 204, 24 Fed. Cas. No. 14,481, where the court said: "The Constitution does not expressly provide for removal from office, otherwise than as the legal effect or consequence of 'impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.' Art. II, sec. 4. If the power of direct removal from office is to be attributed to any department of the government, as necessary to some express power, my mind inclines to the conclusion that upon the language of the Constitution such power can only be attributed to the appointing power."

Right to hold during term prescribed by statute.—Congress, having the right to create an office, has the power to prescribe the term, and the incumbent will hold as against the power of the President during the term for which he was commissioned. *U. S. v. Avery*, (1867) Deady (U. S.) 204, 24 Fed. Cas. No. 14,481, though the court, referring to the case of *Ex p. Hennen*, (1839) 13 Pet. (U. S.) 259, said: "No case in which the question has been directly decided has been cited in the argument, and I am not aware that any exists. The case of [Hennen], *supra*, states the historic fact, that at an early day in the existence of the national government, it was 'much disputed,' whether the power of removal was in the President and Senate, or in the President alone, and that, by both practical and legislative construction, it was assumed and acted upon, that the power was in the President alone. But the court did not actually decide that this construction of the Constitution was warranted by its language, and the question was not really before them for adjudication; yet it cannot be denied that in some measure the court gave its sanction to this doctrine." But see *Parsons v. U. S.*, (1895) 30 Ct. Cl. 248, in which the court, referring to the *Avery* case, said: "The question was not properly in the record of that case, and but reflects the opinion of the judge on the abstract question of the power of the President," *affirmed* (1897) 167 U. S. 335.

Chief Justice Marshall said, in *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 167: "The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new ap-

pointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source."

The remarks of the chief justice in relation to the right of an appointee to retain possession of an office created by Congress in and for the District of Columbia, as against the power of the President to remove him during the term for which he was appointed, are not necessarily applicable to the case of an officer appointed to an office outside of such district. In the District of Columbia Congress is given by the Constitution power to exercise exclusive legislation in all cases. Art. I, sec. 8, subd. 17, Const. U. S. The view that the President had no power of removal in other cases outside of the district, as has been seen, is one that had never been taken by the executive department of the government, nor even by Congress prior to 1867, 14 Stat. 430, ch. 154, when the first tenure of office Act was passed. Up to that time the constant practice of the government was the other way, and in entire accord with the construction of the Constitution arrived at by Congress in 1789. *Parsons v. U. S.*, (1897) 167 U. S. 335.

Early statutory authority.—The power of the President to dismiss an officer from the public service without the consent of the Senate was affirmed by Congress soon after the adoption of the Constitution, and has since received the sanction of every department of the government. *Claim of Surgeon Du Barry for Back Pay*, (1847) 4 Op. Atty-Gen. 603.

"Justice Story says as follows: 'As, however, the tenure of office of no officers except those in the judicial department is, by the Constitution, provided to be during good behavior, it follows by irresistible inference that all others must hold their offices during pleasure, unless Congress shall have given some other duration to their office.' He then gives the history of the power of removal, and of the question whether such power should be exercised by the President and Senate, or by the President alone; and he states the fact that in 1789 Congress affirmed the power in the President alone. This power in the President has never been questioned since, either as to civil or military officers; and as to the latter, it has always been considered especially proper and necessary, and it is declared in their commission." *Gratiot's Case*, (1865) 1 Ct. Cl. 258.

2. As Incident to the Power of Appointment.—In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.

Keim v. U. S., (1900) 177 U. S. 293, wherein the court said: "It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? in the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Affirming* (1898) 33 Ct. Cl. 174. See also *In re Eaves*, (1887) 30 Fed. Rep. 23; *Ex p. Schaumburg*, (1846) 1 Hayw. & H. (D. C.) 249, 21 Fed. Cas. No. 12,441; *Dismissal of Officer in Marine Corps*, (1878) 15 Op. Atty.-Gen. 421; *Power of President to Fill Vacancies*, (1841) 3 Op. Atty.-Gen. 673.

The power to appoint includes the power to remove or suspend unless some other provision of law binding upon the executive interferes with its free exercise, and it has been the unvarying practice of all Presidents to remove from office a civil officer when in their opinion it seemed wise to do so. Nor has the fact that the officer held a commission for a term of years ever been held to give him greater legal right than though it ran "during the pleasure of the President." *Howard v. U. S.*, (1887) 22 Ct. Cl. 316.

Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate, *quære*. *U. S. v. Perkins*, (1886) 116 U. S. 484.

Statute Prescribing Duration of Term.—The President has power to remove a United States district attorney during the term for which he was appointed though the statute authorizing his appointment provides: "District attorneys shall be appointed for a term of four years and their commissions shall cease and expire at the expiration of four years from their respective dates," and the appointment of his successor, by and with the advice and consent of the Senate, is a confirmation of the removal.

Parsons v. U. S., (1897) 167 U. S. 327.

Where the tenure of appointment is not fixed or limited by statute the officer holds at the will of the appointing power, and the

power to remove is incident to the power to appoint. *Thwing v. U. S.*, (1880) 16 Ct. Cl. 13. See also *Register of Wills for District of Columbia*, (1871) 13 Op. Atty.-Gen. 410.

3. Effected by Appointment of Another.—The President, by and with the advice and consent of the Senate, has the power to displace an officer by the appointment of another in his place.

Blake v. U. S., (1880) 103 U. S. 227. See also *Quackenbush v. U. S.*, (1900) 177 U. S. 25; *McElrath's Case*, (1876) 12 Ct. Cl. 202.

There are various modes of effecting removal from office. "It may be made by a notification, by order of the President, that an officer is removed. In such a case, the removal would be complete on the reception of the notice. A removal may also be effected by a new appointment, operating as a revocation of the commission of the present incumbent. *Ex p. Hennen*, (1839) 13 Pet. (U. S.) 230, 261. In this mode the President does not remove the old marshal instantly, and then proceed to make a new appointment, but leaves him to discharge the duties of his office

until certain acts are performed by the new appointee, and then the removal is complete, and the predecessor gives place to the successor. This is the usual practice of the President in removing federal officers, adopted doubtless with a view of preventing anything like an interregnum in offices in which the public is deeply concerned." *U. S. v. Arkansas Bank*, (1846) Hempst. (U. S.) 460, 24 Fed. Cas. No. 14,515.

Necessity for notice to removed officer.—An officer is not removed by the appointment of a new one, until he receives notice of such appointment. *Bowerbank v. Morris*, (1801) Wall. (C. C.) 119, 3 Fed. Cas. No. 1,726.

When an Officer Is Removed Before His Term of Office Expires, and the appointment of his successor is confirmed by the Senate, the action of the Senate is a ratification of the removal of the officer.

Parsons v. U. S., (1896) 30 Ct. Cl. 222, *affirmed* (1897) 167 U. S. 324.

4. Removal of Inferior Officers.—When Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The head of a

department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.

U. S. v. Perkins, (1886) 116 U. S. 484,
affirming (1885) 20 Ct. Cl. 444.

In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment, and all inferior officers must hold their offices at the discretion of the appointing power. Such is the settled usage

and practical construction of the Constitution and laws under which these offices are held.
Ex p. Hennen, (1839) 13 Pet. (U. S.) 258.

Removal may be informal. — Neither a commission nor other technical form of appointment is necessary for the appointment of inferior officers, and their removal from office may be as informal as their appointment.
Thwing's Case, (1880) 16 Ct. Cl. 13.

ARTICLE II., SECTION 2.

"The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

- I. DISTINCTION BETWEEN APPOINTMENT AND NOMINATION, 49.
- II. MUST BE A VACANCY, 49.
- III. APPOINTMENT OF DIPLOMATIC OFFICER TO MEET PUBLIC EMERGENCY, 50.
- IV. POWER EXERCISED BY LETTER FROM SECRETARY OF WAR TO OFFICER, 50.
- V. SECOND TEMPORARY APPOINTMENT ON FAILURE TO MAKE PERMANENT APPOINTMENT, 50.
- VI. VACANCY HAPPENING WHEN SENATE IN SESSION, 50.
- VII. DURING ADJOURNMENT OF SENATE, 51.
- VIII. DURATION OF TEMPORARY APPOINTMENT, 52.
 - 1. *Until End of Next Session*, 52.
 - 2. *Acceptance of New Commission*, 52.

I. DISTINCTION BETWEEN APPOINTMENT AND NOMINATION.— There is no distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session, and appoints when he fills a vacancy temporarily during the recess of the Senate.

President — Appointment of Officers — Holiday Recess, (1901) 23 Op. Atty.-Gen. 599.

duties of the office and continued to serve until notified that his nomination had been rejected, must be deemed to have been legally appointed and entitled to the office. *Gould v. U. S.*, (1884) 19 Ct. Cl. 593.

One appointed to office when the Senate was not in session, who entered upon the

II. MUST BE A VACANCY.— In August, 1898, the Senate being in recess, the President sought to advance Commodore Schley to be a rear-admiral, for "eminent and conspicuous conduct in battle." Supposing that a vacancy was thereby caused in the grade of commodore, the President advanced Captain Higginson to the grade of commodore, and other officers to fill other supposed vacancies, until the claimant, a lieutenant, was advanced to the grade of lieutenant-commander. The officers so advanced were recognized by the departments and paid accordingly. In December, the Senate being in session, the nomination of Commodore Schley was not acted upon, but the promotions of other officers under him were confirmed, including the claimant, whom the President commissioned. Subsequently it was held by the accounting officers that there were no vacancies to which these officers could be appointed, and the overpayments to them were deducted. The ruling of the accounting officers was correct, as the language of the Constitution, "to fill up all vacancies that may happen during the recess of the Senate," necessarily implies, not only the previous

existence of an office, but that "during the recess of the Senate" a vacancy happened in such office which could be filled by the President by commission to expire at the end of the next session of the Congress.

Peck v. U. S., (1904) 39 Ct. Cl. 125.

III. APPOINTMENT OF DIPLOMATIC OFFICER TO MEET PUBLIC EMERGENCY.—

The President has constitutional power to appoint, by temporary commission, a diplomatic officer to meet any public exigency arising in the recess of the Senate. But for the President to change the personnel or raise the rank of the entire diplomatic service of the United States, in the recess of the Senate, and without the concurrence of that co-ordinate authority, would not be a just exercise of the presidential discretion, whether in its relation to the ministers themselves, to the public service, or to the spirit of the Constitution.

Ambassadors and Other Public Ministers of U. S., (1855) 7 Op. Atty.-Gen. 188.

IV. POWER EXERCISED BY LETTER FROM SECRETARY OF WAR TO OFFICER.—

The power of the President to fill a vacancy in the army during a recess of the Senate may be exercised by a letter from the secretary of war to the person to be appointed, stating that the President has appointed him to the office, and such a letter may constitute his commission, and is conclusive evidence that the President has made the appointment.

O'Shea v. U. S., (1893) 28 Ct. Cl. 392.

V. SECOND TEMPORARY APPOINTMENT ON FAILURE TO MAKE PERMANENT APPOINTMENT.—In cases where appointments have been made in the recess prior to the last session of the Senate, and there is a failure during the session to make a permanent appointment, either by the refusal of the Senate to confirm the nominee, a failure to act on the nomination, or other cause, the President can make another temporary appointment in the present recess.

President's Power to Fill Vacancies, (1866) 12 Op. Atty.-Gen. 32, the attorney-general saying: "The true theory of the Constitution in this particular seems to me to be this: that as to the executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If

the Senate is not in session, the President fills the vacancy alone. All that is to be looked to is, that there is a vacancy, no matter when it first occurred, and there must be a power to fill it. If it should have been filled whilst the Senate was in session, but was not then filled, that omission is no excuse for longer delay, for the public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session." See also President's Power to Appoint to Office, (1865) 11 Op. Atty.-Gen. 179.

VI. VACANCY HAPPENING WHEN SENATE IN SESSION.—A vacancy in an office which happens during a session of the Senate and remains unfilled until a recess of the Senate occurs may be filled by the President during such recess by a temporary appointment. The rule is the same in the case of a new office which is not filled during the session in which it was created.

Vacancy in Office. (1889) 19 Op. Atty.-Gen. 261. See also *In re Yancey*, (1886) 28 Fed. Rep. 445.

The President has lawful power in the recess of the Senate to fill a vacancy on the bench of the Supreme Court, which vacancy

existed during the last session of the Senate, by "granting a commission which shall expire at the end of their next session." President's Appointing Power, (1862) 10 Op. Atty.-Gen. 356, the attorney-general saying: "If the question were new, and now for the first time to be considered, I might have serious doubts of your constitutional power to fill up the vacancy, by temporary appointment, in the recess of the Senate. But the question is not new. It is settled in favor of the power, as far at least as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate."

The power to fill vacancies is not limited in its exercise to those which occur during recess. "It was the intention of the Constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or, at all events, that the vacancy should not be a protracted one." Power of President to Fill Vacancies, (1832) 2 Op. Atty.-Gen. 527.

"Mr. Wirt in 1823, Mr. Taney in 1833, and Mr. Legare in 1841, concur in opinion that vacancies, first occurring during the session of the Senate may be filled by the President in the recess. Mr. Mason, in a short opinion given in 1845, held that vacancies known to exist during the session could not be filled in the recess; but in a more elaborate opinion written in 1846 he expresses general concurrence with his three predecessors." President's Power to Fill Vacancies in Recess of Senate, (1866) 12 Op. Atty.-Gen. 33.

"Happen" means "happen to exist."—The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body. Executive Authority to Fill Vacancies, (1823) 1 Op. Atty.-Gen. 631, where the attorney-general said: "If we interpret the word 'happen' as being merely equivalent to 'happen to exist' (as I think we may legitimately do), then all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the Constitution is completely accomplished." See also Matter of Farrow, (1880) 3 Fed. Rep. 115.

This provision is construed to comprehend all vacancies that may happen to exist in a recess of the Senate, and the President has authority to fill, during the recess of the Sen-

ate, not only vacancies that have originated in the recess, but also such as originated while the Senate was in session. Appointments During Recess of Senate, (1880) 16 Op. Atty.-Gen. 522.

The predicament of vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist, during the recess of the Senate, but embraces all vacancies that from casualty happen to exist at a time when the Senate cannot be consulted as to filling them. Case of Collectorship of New Orleans, (1868) 12 Op. Atty.-Gen. 449.

Failure of Senate to act on nomination.—The President made a nomination for an office to the Senate, but it adjourned without acting thereon. Later, during the recess of the Senate, the President issued a commission to the nominee, which he accepted. The appointment was valid. Matter of Farrow, (1880) 3 Fed. Rep. 112.

No confirmation of nomination following temporary appointment.—During a recess of Congress, an office being vacant, an appointment was made, and a commission granted, to expire at the end of the session next ensuing. During the following session a person was nominated for permanent appointment according to law, which was rejected by the Senate, and another nomination was made, on which the Senate made no decision. The attorney-general advised that the vacancy existing at the end of the session could be filled by a temporary appointment. Power of President to Appoint to Office During Recess of Senate, (1846) 4 Op. Atty.-Gen. 523. See also Power of President to Fill Vacancies, (1841) 13 Op. Atty.-Gen. 673.

Contra.—When an office to which an appointment was made was created by an Act of Congress two years prior to the appointment, and there had been two sessions of Congress, and the office had not previously been filled, this was not a vacancy that happened during the recess of the Senate. Schenck v. Peay, (1869) 21 Fed. Cas. No. 12,451.

The President cannot appoint district judges, attorneys, and marshals during a recess of the Senate, for newly admitted states, where the offices were created and took effect during the session of that body. If vacancies are known to exist during the session of the Senate, and nominations are not then made to fill them, they cannot be filled by the executive during the subsequent recess. Appointment of Judges, etc., for Iowa and Florida, (1845) 4 Op. Atty.-Gen. 361.

VII. DURING ADJOURNMENT OF SENATE.—The recess of the Senate during which the President shall have power to fill a vacancy that may happen, means the period after the final adjournment of Congress for the session and before the next session begins; while an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or for such

brief periods of time as are agreed upon by the joint action of the two houses. The President is not authorized to appoint an officer during the current holiday adjournment of the Senate, which will have the effect of an appointment made in the recess occurring between two sessions of the Senate.

President — Appointment of Officers — Holiday Recess, (1901) 23 Op. Atty.-Gen. 599.

VIII. DURATION OF TEMPORARY APPOINTMENT — 1. Until End of Next Session.

— A commission issued by the President during a recess of the Senate continues until the end of the next session of Congress, unless sooner determined by the President, even though the person commissioned shall have been in the meantime nominated by the President to the office and his nomination rejected.

In re Marshalship, etc., (1884) 20 Fed. Rep. 382. See also Commissions Granted During Recess of Senate, (1830) 2 Op. Atty.-Gen. 336.

Until end of next session. — The commission of an officer appointed during a recess, who is afterwards nominated and rejected, is not thereby determined, nor his sureties released from liability, on account of any subsequent breach of his official bond, as the Constitution recognizes the validity of a commission to hold his office until the end of the next session unless it expire by death, resignation, or removal. *Tenure of Appointments Made During Recess of Senate*, (1842) 4 Op. Atty.-Gen. 30. See also *Commissions Granted*

During Recess of Senate, (1830) 2 Op. Atty.-Gen. 336.

Not until successor appointed and qualified. — An Indian agent appointed during a recess of the Senate, not confirmed at the next session, has no title to the office subsequent to the adjournment. In view of the Constitution and statutes of the United States, the opinions of the attorneys-general and of the Supreme Court, as well as the practice of the government, it cannot be said that the principle of the common law, that officers appointed for a term of years hold until their successors are appointed and qualified, has been adopted as applicable to public officers of the United States. *Romero v. U. S.*, (1889) 24 Ct. Cl. 337.

2. Acceptance of New Commission. — The acceptance of a new commission, after confirmation by the Senate of an appointment made during a recess, is a virtual superseding and surrender of the commission granted on the original appointment.

Commissions Granted During Recess of Senate, (1830) 2 Op. Atty.-Gen. 336. See also *U. S. v. Kirkpatrick*, (1824) 9 Wheat. (U. S.) 721.

ARTICLE II., SECTION 3.

"He [the President] shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."

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II. "SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED," 53.

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I. AMBASSADORS AND OTHER PUBLIC MINISTERS. — The construction of the words "ambassadors, other public ministers and consuls," used in the clause defining the power of appointments, as including all the contents of the class, is confirmed by the use of the same words in this clause, meaning all possible diplomatic agents which any foreign power may accredit to the United States.

Ambassadors and Other Public Ministers of U. S., (1855) 7 Op. Atty-Gen. 209.

II. "SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED" — 1. *In General* — The duty of the President to take care that the laws be faithfully executed is not limited to the enforcement of Acts of Congress or of statutes of the United States according to their expressed terms, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.

In re Neagle, (1890) 135 U. S. 64, *affirming* (1889) 39 Fed. Rep. 833.

"The President has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the

government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties." *Eight-Hour Law*, (1890) 19 Op. Atty-Gen. 686.

2. *Has Reference to Laws of United States.* — The clause which makes it the duty of the President to "take care that the laws be faithfully executed"

refers primarily to the laws of the United States, and to those of a state or territory only in the contingency when the case of insurrection therein is presented according to the Constitution and to Acts of Congress.

Insurrection in a State, (1856) 8 Op. Atty.-Gen. 11.

3. Take Measures for Protection of Judges.— It is within the power of the President to take measures for the protection of a judge of one of the courts of the United States who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and where this protection is to be afforded through civil power the department of justice is the proper one to set in motion the necessary means of protection.

In re Neagle, (1890) 135 U. S. 67, *affirming* (1889) 39 Fed. Rep. 833.

4. Assist Judicial Process.— The President is not authorized to execute the laws himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that the laws be faithfully carried into execution as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the Constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments.

Ex p. Merryman, (1861) Taney (U. S.) 246, 17 Fed. Cas. No. 9,487.

5. Appointment of Investigating Agents.— The executive department, being charged with the duty of seeing that the laws are faithfully executed, has authority to appoint commissioners and agents to make investigations, but it cannot pay them except from an appropriation for that purpose.

Executive Power of Appointment, (1843) 4 Op. Atty.-Gen. 248.

6. No Power to Forbid Their Execution.— The obligation imposed on the President to see the laws faithfully executed does not imply a power to forbid their execution, and the postmaster-general cannot justify a failure to perform a duty imposed upon him by law on the ground that he is alone subject to the direction and control of the President.

Kendall v. U. S., (1838) 12 Pet. (U. S.) 524.

III. "SHALL COMMISSION ALL THE OFFICERS" — 1. May Withhold Commission After Confirmation by Senate.— Even after confirmation by the Senate the President may, in his discretion, withhold a commission from the applicant, and until a commission is signified that the purpose of the President has been changed, the appointment is not fully consummated.

Appointments to Office — Case of Lieutenant Cope, (1843) 4 Op. Atty.-Gen. 218. See also *supra*, *No appointment without commission*, p. 44.

2. When Commission Complete.— When a commission has been signed by the President the appointment is made, and the commission is complete when the

seal of the United States has been affixed to it by the secretary of state as directed by Act of Congress.

Marbury v. Madison, (1803) 1 Cranch (U. S.) 162.

When the commission of a postmaster has been signed and sealed, and placed in the hands of the postmaster-general to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the Constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must

give a bond and take an oath, before he possesses the office under the commission; nor that it is the duty of the postmaster-general to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the Constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfils the conditions on his part imposed by law. *U. S. v. Le Baron*, (1856) 19 How. (U. S.) 79.

3. When Appointee Has Right to Delivery of Commission.—By signing a commission, the President appointed a person a justice of the peace in the District of Columbia; the seal of the United States affixed thereto by the secretary of state was conclusive testimony of the verity of the signature and the completion of the appointment; and having this legal title to the office, the appointee had a consequent right to the commission, a refusal to deliver which was a plain violation of that right.

Marbury v. Madison, (1803) 1 Cranch. (U. S.) 168.

If the commission be signed and sealed, and the office be of a character not removable by the President, in that case the President's right over the office no longer exists, for the

right is vested, and is irrevocable. But where the officer belongs to a class removable at any time by the President, there it would seem that the commission, though made out, may be arrested in the office, and the right to the office does not vest. *Adams' Case*, (1867) 12 Op. Atty-Gen. 306.

4. Right of Justices to Hold Circuits Without Commissions.—The justices of the Supreme Court may hold Circuit Courts without having distinct commissions for that purpose.

Stuart v. Laird, (1803) 1 Cranch (U. S.) 299.

ARTICLE II., SECTION 4.

"The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

A Member of Congress is not an officer of the United States in the constitutional meaning of the term. In the case of Blount, on an impeachment before the Senate in 1799, the question arose whether a senator was a civil officer of the United States within the purview of the Constitution, and the Senate decided that he was not.

Member of Congress, (1882) 17 Op. Atty.-Gen. 426.

Nothing but Treason, Official Bribery, or Other High Crimes and Misdemeanors made so by law, and also in their nature of deep moral turpitude, which are dangerous to the safety of the state, and which palpably disqualify and make unfit an incumbent to remain in the office of President, can justify the application of this clause.

Trial of Andrew Johnson, 175, wherein it was further said: "Impeachment was not intended to be used as an engine to gratify private malice, to avenge disappointed expectations, to forward schemes of personal ambi-

tion, to strengthen the measures or continue the power of a party, to punish partisan infidelity, to repress and crush its dissensions, to build up or put down opposing factions."

ARTICLE III, SECTION 1,

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

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Martin v. Hunter, (1816) 1 Wheat. (U. S.) 328, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1.

II. JUDICIAL POWER TO BE VESTED IN COURTS ESTABLISHED BY CONGRESS. — Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.

Martin v. Hunter, (1816) 1 Wheat. (U. S.) 330, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1.

III. UNITED STATES COURTS — 1. Territorial Courts. — A territorial court is not one of those mentioned in article three of the Constitution, declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish, the judges of which hold their offices during good behavior, receiving at stated times, for their services, a compensation that cannot be diminished during their continuance in office, and are removable only by impeachment.

McAllister v. U. S., (1891) 141 U. S. 180, affirming (1887) 22 Ct. Cl. 318. See also *U. S. v. Coe*, (1894) 155 U. S. 85.

The Territories are not within the clause

of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish. *Downes v. Bidwell*, (1901) 182 U. S. 282.

They Are Legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

American Ins. Co. v. 356 Bales Cotton, (1828) 1 Pet. (U. S.) 545. See also *Nickels v. Griffin*, (1872) 1 Wash. Ter. 385.

2. District of Columbia Courts.—That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District, which the Constitution has given to Congress.

Embry v. Palmer, (1882) 107 U. S. 10.

The courts provided for the seat of government are courts of the United States capable of receiving the judicial power provided by this article, so far as this judicial power can be made to apply. *James v. U. S.*, (1903) 38 Ct. Cl. 629, the court saying: "The complete and exclusive jurisdiction of Congress over the district is incompatible with the proposition that the district was intended to be organized for judicial purposes as foreign territory which Congress might dispose of, or as territory to be held so tentatively that

the judicial power could not be lodged in tribunals as national in character as courts provided in those states which had ceded the district for national purposes forever. Territory acquired for the seat of government continues to be national. The rights of persons to their lives, liberty, and property are the same in the district as in the states, and the judicial powers of the Supreme Court created for the district are the same and are to be exercised at law and equity in the same manner for the protection of life and property as in the United States courts created for the states, as near as may be."

Justices of the Peace in the District of Columbia, in the exercise of the jurisdiction conferred upon them by Congress to try and determine cases, civil and criminal, are, in some sense, judicial officers, but they are not inferior courts of the United States, for the Constitution requires judges of all such courts to be appointed during good behavior.

Capital Traction Co. v. Hof, (1899) 174 U. S. 17. See also *U. S. v. Mills*, (1897) 11 App. Cas. (D. C.) 507.

3. Court of Claims.—The Act of Congress establishing the Court of Claims is constitutional. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress, or a head of any of the executive departments. In this respect the authority of the Court of Claims is like to that of an auditor or comptroller—with this difference only: that in the latter case the appropriation is made in advance, upon estimates, furnished by the different executive departments, of their probable expense during the ensuing year; and the validity of the claim is decided by the officer appointed by law for that purpose, and the money paid out of the appropriation afterwards made.

Gordon v. U. S., (1864) 117 U. S. 699.

The jurisdiction of the Court of Claims is subject to the will of Congress, the court not having a constitutional grant of judicial authority; and whatever statutes may be in force at the time a case is adjudicated measure the jurisdiction of the court in the discharge of its official duty. There can be no vested right in the remedial process of the law; it is subject to change at the will of the legislature, whose discretion, as expressed in the statute, marks the boundaries of the

power of the court. *Gordon v. U. S.*, (1891) 26 Ct. Cl. 309.

Action to set aside treaty award for fraud.—When a citizen insists upon a recognition and adjustment of a claim, he imposes a legal obligation upon himself to become subject to the jurisdiction of such court as Congress may empower to adjudicate the claim, and it is within the constitutional power of Congress to impose necessary and proper terms and conditions in the act of jurisdiction. Thus Congress may provide that if an award

which is the subject of litigation was procured by fraud, the parties may be barred from all claim on the faith of the award, and the money may be returned to the government from which it was received. *U. S. v. La Abra Silver Min. Co.*, (1894) 29 Ct. Cl. 433.

When appeals may be taken to Supreme Court. — Congress can confer upon this court powers not strictly judicial; as in the congressional cases, where the court sits merely as a jury to find the facts for legislative consideration; as in the departmental cases, where it may advise an executive department as to its powers and duties; as in the

French spoliation cases, where its functions are those of a quasi-international tribunal to pass upon the obligations and responsibilities of a foreign power. But when a statute gives the Court of Claims jurisdiction and likewise provides that whatever judgment may be rendered may be appealed to the Supreme Court, the questions to be considered must be confined to the legal and equitable rights of the claimants, as the jurisdiction of the Supreme Court, defined by the Constitution, is strictly judicial, and statutory authority can neither take away from nor add to the inherent powers of that tribunal. *Western Cherokee Indians v. U. S.*, (1891) 27 Ct. Cl. 36.

4. United States Commissioner. — A United States commissioner is neither a court nor the judge of any court, nor is he vested by law with any part of the judicial power of the United States, for the judicial power is vested in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish," and cannot be vested in a commissioner, who is neither made a court, nor empowered to hold a court in the constitutional sense. He is an inferior officer of the court, appointed by it by authority of Congress, with defined and circumscribed powers, but no part of the judicial power of the United States is vested in him, nor can it be.

In re Sing Tuck, (1909) 126 Fed. Rep. 397.

5. Clerks of Courts. — Congress has no authority to confer judicial power upon clerks of courts, for under the provisions of the Constitution the judicial power of the United States can only be vested in and be exercised by courts created and established by law to expound and administer the law in application to the cases and controversies which may come before them in due course of legal procedure.

State v. Sullivan, (1892) 50 Fed. Rep. 599.

6. Military Courts in Conquered Territory. — The provision that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," has no application to the abnormal condition of conquered territory in the occupancy of the conquering army. It refers only to courts of the United States, which military courts are not.

Mechanics', etc., Bank v. Union Bank, (1874) 22 Wall. (U. S.) 295, wherein the court said that the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent states occupied by the national forces is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors; *affirming* (1873) 25 La. Ann. 387. See also *Burke v. Tregre*, (1870) 22 La. Ann. 629.

A military commission cannot exercise any part of the judicial power of the country. Jurisdiction cannot be conferred upon such a court under the "laws and usages of war" over citizens in states which have upheld the authority of the government and where the courts are open and their process unobstructed. *Ex p. Milligan*, (1866) 4 Wall. (U. S.) 121. See also *In re Vidal*, (1900) 179 U. S. 126, that a military tribunal is not a court having jurisdiction "in law or equity."

7. Courts of Indian Offenses. — "Courts of Indian offenses" are not the constitutional courts provided for in this section, which Congress only has the

power to ordain and establish, but mere educational and disciplinary instrumentalities by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to which it sustains the relation of guardian.

U. S. v. Clapox, (1888) 35 Fed. Rep. 577.

8. Pacific Railway Commission.—The Pacific railway commission is not a judicial body, and possesses no judicial powers under the Act of Congress of March 3, 1887, creating it, and can determine no rights of the government, or of the corporation whose affairs it is appointed to investigate.

Matter of Pacific R. Commission, (1887) 32 Fed. Rep. 241.

9. Interstate Commerce Commission.—The interstate commerce commission is not invested, and cannot be invested under the Constitution, with purely judicial power. Its functions are necessarily restricted to the performance of administrative duties, with such *quasi*-judicial powers as are incidental and necessary to the proper performance of those duties.

Interstate Commerce Commission v. Cincinnati, etc., R. Co., (1896) 78 Fed. Rep. 612.
193. See also Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep.

10. Status of State Courts Administering Federal Law.—A state court, while entertaining proceedings for naturalization, remains a part of the sovereignty of the state and does not become a federal court, and perjury committed by a witness in such a proceeding is punishable in the state court, and a federal court cannot entertain jurisdiction in the absence of a federal statute conferring it.

U. S. v. Severino, (1903) 125 Fed. Rep. 953.

IV. NATURE AND EXERCISE OF JUDICIAL POWER — 1. Duty of Judiciary to Construe Statutes — a. IN GENERAL.—The judicial department has imposed upon it, by the Constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender or to waive it.

U. S. v. Dickson, (1841) 15 Pet. (U. S.) 162.

The judicial department must determine the construction of all laws involved in cases before them, but it is also their duty to give to a construed Act its intended practical operation so far as that is possible. An Act

of Congress which declares that a prior statute "shall not be so construed" as to have a certain effect should not be given a retrospective or retroactive effect, because such an operation of a statute on rights vested by contract conflicts with the general rules of judicial and legislative instincts. *Bassett's Case*, (1866) 2 Ct. Cl. 448.

b. TO DETERMINE CONSTITUTIONALITY OF STATUTES.—The judicial power covers every legislative Act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution. This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the states from any encroachment upon their reserved rights by the general government. And as the Constitution is the fundamental and supreme

law, if it appears that an Act of Congress is not pursuant to and within the limits of the power assigned to the federal government, it is the duty of the courts of the United States to declare it unconstitutional and void.

Ableman v. Booth, (1858) 21 How. (U. S.) 520, wherein the court further said: "The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any Act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if it is not pursuant to the legislative powers conferred upon Congress. And as the final appellate power in all such questions is given to this court, controversies as to the respective powers of the United States and the states, instead of being determined by military and physical force, are heard, investigated, and finally settled, with the calmness and deliberation of judicial inquiry." See also *Powell v. Pennsylvania*, (1888) 127 U. S. 686.

Whether an Act of Congress is within the limits of its delegated power or not is a judicial question, to be decided by the courts, the Constitution having, in express terms, declared that the judicial power shall extend to all cases arising under the Constitution. *Gordon v. U. S.*, (1864) 117 U. S. 706. See also *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 176. See *Cooper v. Telfair*, (1800) 4 Dall. (U. S.) 14.

Courts cannot declare legislative acts unconstitutional upon agreed and general statements and without the fullest disclosure of material facts. "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving

the validity of any Act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative Act." *Chicago, etc., R. Co. v. Wellman*, (1892) 143 U. S. 345.

Whether a mere exceeding of the powers of Congress, in legislation, without a repugnancy to express provisions of the Constitution, is among the proper objects of cognizance in the federal judiciary, would probably depend upon the extent of the degree of legislative discretion. *U. S. v. The William*, (1808) 2 Hall Law J. 255, 28 Fed. Cas. No. 16,700.

Relation to judicial power in England.—The position and rank assigned to the Supreme Court in the government of the United States differ from that of the highest judicial power in England, which is subordinate to the legislative power, and bound to obey any law that Parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Charta or the Petition of Rights. *Gordon v. U. S.*, (1864) 117 U. S. 700.

Every Legislative Act Is to Be Presumed to Be a Constitutional exercise of legislative power until the contrary is clearly established.

Close v. Glenwood Cemetery, (1882) 107 U. S. 475. See also *Ex p. Thornton*, (1832) 12 Fed. Rep. 541.

Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no Act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an Act in question is clearly demonstrated. *U. S. v. Harris*, (1882) 106 U. S. 635.

When this court is called on in the course of the administration of the law to consider whether an Act of Congress, or of any other department of the government, is within the constitutional authority of that department, a due respect for a co-ordinate branch of the government requires that we shall decide that it has transcended its powers only when that is so plain that we cannot avoid the duty. *Trade-Mark Cases*, (1879) 100 U. S. 96.

Declared invalid only in a clear case.—"It is unnecessary, at this time, for me to determine whether this court constitutionally possesses the power to declare an Act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution; but if the court have such power, I am free to declare that I will never exercise it but in a very clear case." *Per Chase, J.*, in *Hylton v. U. S.*, (1796) 3 Dall. (U. S.) 175.

Federalist.—If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their

will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words,

the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents. Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. Hamilton, in *The Federalist*, No. LXXVIII.

c. VALIDITY OF STATE STATUTES UNDER STATE CONSTITUTIONS. — The Supreme Court of the United States has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void.

Calder v. Bull, (1798) 3 Dall. (U. S.) 392.

d. WISDOM OF LEGISLATIVE ENACTMENTS. — Courts do not sit in judgment on the wisdom of legislative or constitutional enactments.

Louisville, etc., R. Co. v. Kentucky, (1902) 183 U. S. 512. See also *Lottery Case*, (1903) 188 U. S. 363.

"Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an Act, which was within a power conferred, was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary

was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation." *McCray v. U. S.*, (1904) 195 U. S. 53.

"So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all." *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 350.

2. Must Have Power to Render Judgment. — The Supreme Court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress.

Gordon v. U. S., (1864) 117 U. S. 704.

Finding certified to secretary of treasury not conclusive. — By section 6 of the Act of June 22, 1874, providing "that no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services duly certified by said court or judge for the information of the secretary of the treasury; but no certificate

of the value of such services shall be conclusive of the amount thereof," no judicial duty is required to be performed by, and no judicial power is conferred upon, the court, and hence the court is without jurisdiction to act in the premises. The duty attempted to be imposed by section 6 upon the courts is simply clerical in its nature, which may be as conveniently and efficiently discharged by any competent member of the executive department. *Ex p. Riebeling*, (1895) 70 Fed. Rep. 310. See also *U. S. v. Queen*, (1900) 105 Fed. Rep. 269.

3. Power to Punish for Contempt. — The power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court.

In re Debs, (1895) 158 U. S. 594, denying a petition for a writ of habeas corpus on reviewing. *U. S. v. Debs*, (1894) 64 Fed. Rep. 724. See sec. 725, R. S. U. S., Fed. Stats. Annot., vol. 4, p. 534.

The authority to punish for contempt is granted as a necessary incident in establish-

ing a tribunal as a court. The common law cannot be resorted to for aid in giving jurisdiction in the courts of the United States, but only in deciding certain questions after jurisdiction is otherwise obtained. *U. S. v. New Bedford Bridge*, (1847) 1 Woodh. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

Congress Has the Right to Limit the power of the federal courts to punish for contempt.

Ex p. Powlson, (1835) 19 Fed. Cas. No. 11,350.

Commissioner cannot be invested with power. — Congress has not the power to invest a commissioner with the authority, in a proceeding originally instituted before him, to summarily commit a citizen for an alleged

contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which these commissioners were appointed and held their offices. *Ex p. Doll*, (1870) 7 Phila. (Pa.) 595, 7 Fed. Cas. No. 3,968.

4. No Supervising Power over Administrative Departments. — The courts have no general supervising power over the proceedings and action of the various administrative departments of government.

Keim v. U. S., (1900) 177 U. S. 293, affirming (1898) 33 Ct. Cl. 174. See also *Georgia v. Stanton*, (1867) 6 Wall. (U. S.)

71; *Astrom v. Hammond*, (1842) 2 McLean (U. S.) 107, 2 Fed. Cas. No. 596.

5. Interference by Political Department with Judicial Power. — There is no power in the executive government to revise and reverse the judgments of the prize or other courts of law of the United States, or to criticise and condemn their supposed errors.

Captures on The Rio Grande, (1864) 11 Op. Atty.-Gen. 117.

The Constitution and laws have committed to the admiralty courts exclusive jurisdiction of a case in admiralty, and when such a court has ordered a vessel libeled for violation of the neutrality laws to be released on bond, all opportunity as well as right on the part of the government to object or resist is terminated, and the executive department of the government is without power to interfere. *The Meteor*, (1866) 12 Op. Atty.-Gen. 2.

The political department of the government

has no legal power to annul or alter the judgment of a court of law, and the attorney-general will not, at the request of the secretary of state, give an opinion as to the sufficiency of the grounds on which such a judgment was based. *The Teresita's Case*, (1862) 10 Op. Atty.-Gen. 347.

The attorney-general has no such official relation to the judge of a United States District Court as would warrant him in asking of the judge an explanation of any transaction in which, having lawful jurisdiction, he has been judicially engaged. *Extradition of Tranggott Muller*, (1863) 10 Op. Atty.-Gen. 501.

V. IMPOSING JUDICIAL OR NONJUDICIAL DUTIES ON THE COURTS — 1. Reviewing Nonjudicial Proceedings — a. IN GENERAL. — Congress may provide for the review of the action of commissions and boards created by it, exercising only quasi-judicial powers, by the transfer of their proceedings and decisions, denominated appeals for want of a better term, to judicial tribunals for examination and determination *de novo*.

Stephens v. Cherokee Nation, (1899) 174 U. S. 477.

b. OF SPECIAL DUTIES IMPOSED ON JUDGE UNDER A TREATY. — An Act of Congress, in order to carry out the provisions of a treaty, authorized the judgment of the superior courts established at St. Augustine and Pensacola respectively to receive and adjust all claims arising within their respective jurisdictions agreeably to the provisions of the treaty, and by a further special law authorized the district judge of the United States for the northern district of Florida to receive and adjudicate the claims of certain persons. It was held that such a tribunal was not a judicial one and that the Act of Congress did not intend to make it one, nor were the powers exercised by the district judge judicial in their nature, and such a proceeding could not be reviewed by the United States Supreme Court.

U. S. v. Ferreira, (1851) 13 How. (U. S.) 48.

c. OF BOARD OF LAND COMMISSIONERS. — The Act of March 3, 1851, established a board of land commissioners to settle private land claims in California, and provided for a review of the decision by the District Court on petition of the claimant or the district attorney, on behalf of the United States. Upon objection that as this board, as organized, was not a court under the Constitution, and could not, therefore, be invested with any of the judicial powers conferred upon the general government, the law prescribing an appeal to the District Court from the decision of the board of commissioners was unconstitutional, the court said that the suit in the District Court was to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court.

U. S. v. Ritchie, (1854) 17 How. (U. S.) 533, wherein the court said: "The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The District Court is not confined to a mere re-examination of the case as heard and de-

cided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony which had been used before the board, they being made evidence in the District Court; and also upon such further evidence as either party may see fit to produce."

d. OF INTERSTATE COMMERCE COMMISSION. — The Act of Congress creating the interstate commerce commission has not attempted to confer upon the courts nonjudicial functions. A court is not made, by the Act, the mere executioner of the commissioners' order or recommendation so as to impose upon the court a nonjudicial power. A suit is, under the provisions of the Act, an original and independent proceeding in which the commission's report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep. 614.

2. Issue of Subpoenas in Aid of Administrative Examinations. — An Act of Congress authorizing the interstate commerce commission to invoke the aid

of any court of the United States in requiring the attendance of witnesses, and the production of documents, books, and papers, is valid.

Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 489, wherein the court said: "We are of opinion that a judgment of the Circuit Court of the United States determining the issues presented by the petition of the interstate commerce commission, and by the answers of the appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. A final order by that court dismissing the petition of the commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition."

Congress may authorize the courts to enforce subpoenas applied for by the pension bureau, to compel witnesses to appear and testify before executive officers on the subject of pension claims, and in this respect the Act of July 15, 1882, is valid. *In re Gross*, (1897) 78 Fed. Rep. 107, following *Interstate Commerce Commission v. Brimson*,

(1894) 154 U. S. 489, as to conferring upon the courts power to enforce subpoenas issued by the interstate commerce commission.

"In the case of *In re McLean*, (1888) 37 Fed. Rep. 648, Mr. District Judge Benedict, upon an application made by a commissioner of pensions for a subpoena under these Acts, refused the subpoena, upon the ground that Congress did not have the power to invoke the aid of the courts in a purely executive examination pending in an executive department of the government. For this he stated as authority the judgment of Mr. Justice Field in *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 241, in which substantially the same ruling was made. Subsequently, the same ruling was made by Mr. Circuit Judge Gresham in *In re Interstate Commerce Commission*, 53 Fed. Rep. 476. It is contended by the district attorney that these decisions have been overruled by the case of *Interstate Commerce Commission v. Brimson*, (1894) 154 U. S. 447. Possibly, in some respects, these decisions are inconsistent with each other, and it may be said that the power of Congress to authorize an administrative commission to invoke the aid of the courts in compelling the production of witnesses and documentary evidence before the commission for the purposes of their examinations, and the punishment of such witnesses for false swearing and perjury, has been established by the *Brimson* case." U. S. v. Bell, (1897) 81 Fed. Rep. 847.

3. Appointment of Supervisors of Election.—An Act of Congress requiring the Circuit Courts to appoint supervisors of election is not unauthorized as imposing upon the Circuit Courts duties not judicial.

Ex p. Siebold, (1879) 100 U. S. 397.

An Act of Congress providing that "whenver in any city or town having upwards of twenty thousand inhabitants, there are two citizens thereof, or whenever in any county or parish, in any congressional district, there are ten citizens thereof, in good standing, who prior to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, may make known, in writing, to the judge of the Circuit Court of the United States for the circuit wherein such city or town, county or

parish, is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not less than ten days prior to the registration, if one there be, or if no registration be required, within not less than ten days prior to the election, shall open the Circuit Court at the most convenient point in the circuit," is not unconstitutional as imposing upon the judiciary nonjudicial duties. If the Act commanded the court to supervise the elections it would be invalid, but the command is that the court shall appoint others to perform that duty. *Matter of Sundry Citizens, etc.*, (1878) 2 Flipp. (U. S.) 228, 23 Fed. Cas. No. 13,628.

4. To Fix Rates and Tolls.—An Act of Congress providing that railway companies shall have the right of passage over a bridge "under and upon such terms and conditions as shall be prescribed by the District Court of the United States for the northern district of New York, upon hearing the allegations and proofs of the parties, in case they shall not agree," is not invalid as conferring upon a United States court other than judicial functions.

Canada Southern R. Co. v. International Bridge Co., (1881) 8 Fed. Rep. 191, (1880) 7 Fed. Rep. 653, wherein the court said: "If the Act provides for a determination of the terms and conditions upon which the railway companies may use the bridge in case the parties fail to agree, inasmuch as this determination is committed by the Act to a judicial tribunal upon hearing the proofs and

allegations of the parties, the inference is cogent that the tribunal is to proceed according to the settled principles which control judicial action; it is not to exercise an arbitrary discretion, but a judicial discretion; it is to ascertain the rights of the parties by evidence, and to adjudicate upon them under the sanctions of precedent and in conformity with established rules of law."

5. Rule of Court as to Appointing Examiners in Another District. — It was not unconstitutional for the Supreme Court, under the Acts of Congress empowering the Supreme Court to prescribe and regulate the forms and modes of taking and obtaining evidence in equity and admiralty cases, to adopt the sixty-seventh equity rule authorizing the courts to appoint examiners to take testimony in another district and circuit, and giving the court within that other district power to compel the witness to attend and take oath before the examiner.

White v. Toledo, etc., R. Co., (C. C. A. 1897) 79 Fed. Rep. 133. See *Arnold v. Chesebrough*, (1888) 35 Fed. Rep. 16.

VI. EXERCISE OF JUDICIAL FUNCTIONS BY OTHER DEPARTMENTS — 1. Assumption by Congress — a. PRESCRIBING RULE OF DECISION. — The provision of the Act of July 12, 1870, "that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the Act of March 12, 1863; and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted, in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant," was held to be unconstitutional.

U. S. v. Klein, (1871) 13 Wall. (U. S.) 147, wherein the court said: "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power. It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, 'the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.' Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal.

Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." See also *Witkowski's Case*, (1871) 7 Ct. Cl. 397, wherein it was said: "It may be noted here that this part of the decision, which received the unanimous assent of all the judges of the Supreme Court in a suit where the nature, functions, powers, and duties of the Court of Claims necessarily formed the foundation of the whole case, overrules by necessary implication some of the very questionable utterances that found their way into the opinion of that court in the earlier case of *De Groot v. U. S.*, (1866) 5 Wall. (U. S.) 432. It is not possible to

reconcile the present decision, that the legislature may not 'prescribe rules of decision to the judicial department of the government, in cases pending before it,' with the former dictum that 'Congress has the power' 'to prescribe the rule by which such cases may be determined' in this court; 'or prescribe in such cases the circumstances under which alone the court may render a judgment against the government.'"

An Act of Congress which seeks to direct the judiciary in the judgment which it should render, and to direct a readjudication of that which had already been adjudicated according to law, is a plain invasion and

violation of constitutional right. *Ross v. U. S.*, (1896) 8 App. Cas. (D. C.) 37.

Absence of ruling on motion deemed denial. — It is not an unconstitutional assumption of judicial functions for the statute of a territory to provide that in case there shall be no ruling on a motion for a new trial during the term at which it was filed, then the motion shall be denied and the questions that may have been raised thereby shall be subject to review by the Supreme Court as if said motion had been overruled and exceptions thereto reserved and entered on the minutes of the court. *James v. Appel*, (1904) 192 U. S. 135.

b. PRESCRIBING RULES OF EVIDENCE. — The provision in the statute creating the interstate commerce commission, making the findings of the commission *prima facie* evidence in subsequent judicial proceedings, is not open to valid constitutional objection. Such a provision merely prescribes a rule of evidence clearly within well-recognized powers of the legislature, and in no way encroaches upon the court's proper function.

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep. 614.

c. PRESCRIBING FORMS OF PROCEEDINGS. — Congress possesses the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States, and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in its judgment best promote the public convenience and the true interests of the citizens.

Ex p. New Orleans City Bank, (1845) 3 How. (U. S.) 317.

Congress has the power to establish Circuit and District Courts in any and all the states, and confer on them equitable jurisdic-

tion in cases coming within the Constitution. The power to ordain and establish carries with it the power to prescribe and regulate the modes of proceeding in such courts. *Livingston v. Story*, (1835) 9 Pet. (U. S.) 655.

Congress May Confer upon the Courts Power to Make Alterations and additions in process as well as in the modes of proceeding in suits. The power to alter and add to the process and modes of proceeding in a suit embraces the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment shall be satisfied.

Wayman v. Southard, (1825) 10 Wheat. (U. S.) 1; *U. S. Bank v. Halstead*, (1825) 10 Wheat. (U. S.) 51; *Beers v. Haughton*, (1835) 9 Pet. (U. S.) 359. See also *White v. Toledo, etc., R. Co.*, (C. C. A. 1897) 79 Fed. Rep. 133, as to the validity of a rule of the Supreme Court, adopted under the authority

of section 862, R. S., empowering a court to appoint an examiner to take testimony in another district and circuit, and giving the United States courts within that other district authority to compel the witness to attend and take an oath before the examiner.

d. AUTHORIZING SERVICE OF PROCESS IN OR OUT OF DISTRICT. — There is nothing in the Constitution which forbids Congress to enact that, as to a class of cases or a case of special character, a Circuit Court — any Circuit Court — in which the suit may be brought, shall, by process served anywhere in the United States, have the power to bring before it all the parties necessary to its decision. Whether parties shall be compelled to answer in a court of the United States

wherever they may be served, or shall only be bound to appear when found within the district where the suit has been brought, is merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, etc., but which, when exercised by Congress, is controlling on the courts.

U. S. v. Union Pacific R. Co., (1878) 98 U. S. 604.

e. AUTHORIZING EXECUTIONS TO ISSUE ON JUDGMENTS.

See under the last clause of section 8, Article I., giving to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this

Constitution in the government of the United States or in any department or officer thereof," *Power to authorize executions to issue on judgments*, 8 FED. STAT. ANNOT. 682.

f. PROVIDING FOR APPEALS TO OPERATE RETROSPECTIVELY. — An Act of Congress extending the remedy by appeal to the Supreme Court to act retrospectively is not invalid as an invasion of the judicial domain, and destructive of vested rights.

Stephens v. Cherokee Nation, (1899) 174 U. S. 477, wherein the court said: "While it is undoubtedly true that legislatures cannot set aside the judgments of courts, compel them to grant new trials, order the

discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry, the grant of a new remedy by way of review has been often sustained under particular circumstances."

g. PRESCRIBING QUALIFICATIONS FOR ADMISSION TO THE BAR. — Congress has not the right to prescribe qualifications to persons who desire admission to the bar of the national courts as attorneys or counselors.

In re Shorter, (1865) 22 Fed. Cas. No. 12,811, citing *Ex p. Secombe*, (1856) 19 How. (U. S.) 9, in which case the court said: "It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers as an attorney and counselor, and for what cause he ought to be removed. The power,

however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court as the rights and dignity of the court itself."

h. INVESTIGATION OF AFFAIRS OF DEBTOR OF UNITED STATES. — A resolution of the House of Representatives authorizing an investigation by the House into the affairs of a debtor of the United States was in excess of the power conferred on that body by the Constitution.

Kilbourn v. Thompson, (1880) 103 U. S. 196, wherein the court said: "The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was

directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative."

i. PRESCRIBING CONDITIONS TO RECOVERY AGAINST THE GOVERNMENT. — The Constitution vests no judicial power in Congress, and Congress cannot award a new trial judicially nor reverse the judgment of a court of justice; but Congress, as defendant, may consent to a second action, and may waive a techni-

cal defense and may impose conditions upon the claimant. The United States cannot be sued without their consent, but their consent may be given by Congress as well to a second action as to a first. Hence a joint resolution of Congress re-referring a claim for the decision of the Court of Claims "in accordance with the principles of equity and justice," with a proviso that the court shall not render judgment beyond a certain amount, is to be construed as the consent of the defendant to a second action and its waiver of a former technical defense. The claimant, by bringing his second action and setting up the joint resolution, consents to its conditions.

Nock's Case, (1866) 2 Ct. Cl. 451.

2. Imposed on Executive and Administrative Officers — a. IN GENERAL. — Congress can neither withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.

Murray v. Hoboken Land, etc., Co., (1855) 18 How. (U. S.) 274.

"It is manifest, we think, that by the term 'judicial power' is here meant that power with which the courts are to be clothed for the purpose of the trial and determining of causes. The judges of these courts are to hold their offices during good behavior; and

this 'judicial power' is to extend to all 'cases,' in law and equity, arising under the Constitution, etc. It was not intended by the general terms here employed to deny to the other departments the exercise of powers in their nature judicial, if essential to render the powers expressly delegated to them effectual." *Ex p. Gist*, (1855) 26 Ala. 162.

b. ON JUDGES IN NONJUDICIAL CAPACITY. — Congress may by law impose duties upon executive and ministerial officers of the government, which require them to consider and determine questions of law and of fact, but in so doing they do not exercise judicial power. Such duties have been imposed upon judges, to be performed out of the course of the courts; and their decisions, although judicial in nature, are held not to have been made in the exercise of judicial power under the Constitution.

State v. Sullivan, (1892) 50 Fed. Rep. 599.

c. GIVING PRESIDENT POWER TO REFUSE TO ACCEPT CONDEMNED PROPERTY. — An Act of Congress providing for the condemnation of land for public uses is not unconstitutional because it provides that the values fixed by the commission are not to be paid unless the President shall decide the same to be reasonable. The President is given, by the Act, no power to take the property against the verdict of the assessors; he is only vested with authority either to acquiesce in their judgment or to decline to accept the property.

U. S. v. Cooper, (1891) 20 D. C. 104.

d. WHETHER BRIDGE IS AN OBSTRUCTION TO NAVIGATION. — An Act of Congress which does not delegate to the secretary of war all the power of

Congress in regard to the construction of bridges over navigable waters, and to declare where bridges shall be built, but delegates the power only to determine whether an existing bridge is an unreasonable obstruction to navigation, and to direct the manner in which the injury can be obviated, is not invalid as a delegation of judicial power to an administrative officer.

E. A. Chatfield Co. v. New Haven, (1901) 110 Fed. Rep. 793, in which the court quoted with approval the language of the court in *U. S. v. Moline*, (1897) 82 Fed. Rep. 592, on a similar statute: "The secretary of war has no power to carry out his decisions respecting these obstructions except through a court. Any question, whether of law or

fact, essentially judicial, may be raised under these informations. A court of the United States stands always, by the clear provisions of the Act, between the decision of the secretary and its execution. There is, therefore, in the Act, no delegation of judicial power to the secretary that is not open to review in the courts."

e. IDENTIFICATION AND DEPORTATION OF ALIENS. — Congress has power to forbid aliens from coming within the borders of the United States, and can devolve the power and duty of identifying and arresting such persons, and causing their deportation, upon executive or subordinate officials.

U. S. v. Williams, (1904) 194 U. S. 291.

The determination of all questions of fact relating to controversies between the United States and citizens thereof does not necessarily devolve upon or belong to the judicial department of the government. There are many cases where the other departments are the sole and final arbiters in such controversies. It is competent for Congress to

commit to executive officers appointed by the heads of departments having jurisdiction of immigration and interstate commerce the determination of the facts on which the citizenship of Chinese persons applying for admission into the United States depends. *In re Sing Tuck*, (1903) 126 Fed. Rep. 395. See also *In re Moyquong Shing*, (1903) 125 Fed. Rep. 642.

f. POWER TO ADJUST CLAIMS UNDER A TREATY. — A power to adjust claims under a treaty may be constitutionally conferred on the secretary of the treasury as well as on the commissioner, but such a power is not judicial in either case in the sense in which judicial power is granted by the Constitution to the courts of the United States.

U. S. v. Ferreira, (1851) 13 How. (U. S.) 48.

g. USE OF SET-OFF TO JUDGMENT AGAINST UNITED STATES. — Where the government, as defendant, has sought to use an independent demand against the claimant by way of set-off, the secretary of the treasury cannot afterward use it to reduce a judgment recovered by the claimant; but where the government did not set up in the suit its independent cross-demand, the secretary may assert it as a set-off against the judgment in the manner provided by statute. In the former case his action would be an unconstitutional assumption of judicial power; in the latter, constitutional and legal.

Bonnafon's Case, (1878) 14 Ct. Cl. 484.

h. ISSUE OF DISTRESS WARRANT BY SOLICITOR OF TREASURY. — The issue of a distress warrant by the solicitor of the treasury under an Act of Congress entitled "An Act providing for the better organization of the treasury department," was held not to be void, as the exercise by an executive department of a judicial function.

Murray v. Hoboken Land, etc., Co., (1855) 18 How. (U. S.) 274. But see *U. S. v. Taylor*, (1845) 3 McLean (U. S.) 539, 28 Fed. Cas. No. 16,440.

i. **DETERMINING DISPUTABLE QUESTIONS UNDER TARIFF ACT.** — A provision in a tariff Act which leaves the decision of disputable questions with an administrative officer rather than with the courts is not unconstitutional.

Cruikshank v. Bidwell, (1898) 86 Fed. Rep. 7, wherein the court said: "No citizen of the United States has a vested right to import teas, if Congress, under its power to regulate commerce, prohibits their importation. And if that body chooses to admit only those teas which may be approved by such administrative officer as it selects, the

legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter." Decree denying motion for an injunction *affirmed*, as no tenable basis for equity interposition was shown, (1900) 176 U. S. 73.

j. **DETERMINING RIGHT TO RECEIVE MAIL MATTER.** — An Act of Congress, the effect of which is that as long as the postmaster-general is satisfied that any one is engaged in one of the schemes or enterprises described in the statute, the person so engaged, while the ordinary mail is open to him as to all others for the receipt or transmission of ordinary mail matter, shall not be entitled to receive through the mail either the registered letters or money orders provided for in the law, is not invalid as an attempt to clothe the postmaster-general with judicial power.

Dauphin v. Key, (1880) *MacArthur & M.* (D. C.) 205.

k. **IMPOSING PENALTY FOR FRAUDULENT TAX VALUATION.** — An Act of Congress which imposes an addition of one hundred per cent. to the income tax of a citizen as a penalty for the "return of a false or fraudulent list or valuation" is not unconstitutional as conferring on the assessor judicial power. The Act does not invest the assessor with power to "sentence" anybody; it does not even allow him any discretion as to the penal increase of the tax. It authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add one hundred per centum to the tax. This is not conferring judicial power upon him, within the meaning of the Constitution. It is simply empowering him to ascertain a fact, according to which he is to adjust the amount of the tax imposed by law.

Doll v. Evans, (1782) 9 Phila. (Pa.) 364, 29 Leg. Int. (Pa.) 116, 7 Fed. Cas. No. 3,969.

l. **RIGHT TO COLLECT OR REFUND TONNAGE TAX.** — Section 3 of the Act of July 5, 1884, providing "that the commissioner of navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation, growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refunding of such tax when collected erroneously or illegally, his decision shall be final," is not invalid as investing a department officer with judicial power.

North German Lloyd Steamship Co. v. Hedden, (1890) 43 Fed. Rep. 19.

VII. CONTROL OF EXECUTIVE OFFICERS BY MANDAMUS OR INJUNCTION. —

The judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; it is only in cases where the executive officer has to perform a purely ministerial act that

the courts, either by a proceeding in mandamus or injunction, can direct or control the performance of such ministerial act.

Dudley v. James, (1897) 83 Fed. Rep. 349.
See also Gaines v. Thompson, (1868) 7 Wall. (U. S.) 347; Taylor v. Kercheval, (1897) 82 Fed. Rep. 497.

See *infra*, *Mandamus*, pp. 107, 123.

From enforcing alleged unconstitutional law.—The President cannot be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional. *Mississippi v. Johnson*, (1866) 4 Wall. (U.

S.) 498. See *Hoover v. McChesney*, (1897) 81 Fed. Rep. 482.

Though the matter may become the subject of judicial inquiry, while it is pending before the department, and the officers are bringing to bear upon it their own judgment and discretion, a court has no right to interfere with their action by injunction. *New Orleans v. Paine*, (1893) 147 U. S. 261, *affirming* (1892) 51 Fed. Rep. 833.

A Ministerial Duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.

Mississippi v. Johnson, (1866) 4 Wall. (U. S.) 498.

VIII. DIMINUTION OF COMPENSATION.—A specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him, which, in the case of the judges, would be prohibited by the Constitution of the United States if the Act of Congress levying the tax were passed during the official term of the judge concerning whom the question should arise.

President and Judges—Tax on Salaries, (1869) 13 Op. Atty.-Gen. 162.

Territorial courts are not inferior courts within the meaning of the Constitution, and the provision which declares that the judges

"of the Supreme and inferior courts shall receive for their services a compensation which shall not be diminished" does not extend to territorial judges. *Fisher's Case*, (1879) 15 Ct. Cl. 324.

IX. TENURE "DURING GOOD BEHAVIOR."—Congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office—that of holding "during good behavior."

Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., (1889) 37 Fed. Rep. 612.

A territorial court is not a court of the United States in the sense of the Constitution, but, with its judges, is a creation of Congress, subject to the will of that body exercised under the power given it to "make all needful rules and regulations respecting

the territory or other property of the United States." These judges, being then officers not covered by the clause fixing the tenure of the United States judges "during good behavior," are subject to the same incidents as to removal or suspension as are other civil officers appointed by the President after confirmation by the Senate. *Howard v. U. S.*, (1887) 22 Ct. Cl. 316.

ARTICLE III., SECTION 2.

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states, — between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

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I. JURISDICTION DERIVED FROM CONSTITUTION OR LAWS.—Under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States.

Jecker v. Montgomery, (1851) 13 How. (U. S.) 515.

See generally the title *Judiciary*, 4 FED. STAT. ANNOT. 195.

Judicial power coextensive with legislative powers.—A judicial power is coextensive

with the legislative powers upon the plain ground that the Constitution meant to provide ample means to accomplish its own ends by its own courts. *Mitchell v. Great Works Milling, etc., Co.*, (1843) 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.

II. EXERCISE OF JURISDICTION AS DEPENDENT ON STATUTES—1. **Supreme Court.**—The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it.

Stevenson v. Fain, (1904) 195 U. S. 167. See also *U. S. v. Hudson*, (1812) 7 Cranch (U. S.) 32.

See further *infra*, p. 122, *Original Juris-*

isdiction of Supreme Court—*Congress Without Power to Enlarge or Restrict Original Jurisdiction*; and p. 125, *Appellate Jurisdiction of Supreme Court*—*Confined to Limits Prescribed by Statute*.

2. **Inferior Courts**—*a. IN GENERAL.*—The primary source of jurisdiction in the federal courts is found in the Constitution, but it is directly conferred through the medium of Congress by grants thereof, and is conferred with such

limitations and exceptions as the Congress shall prescribe when creating the courts and defining their authority.

U. S. v. Eckford, (1867) 6 Wall. (U. S.) 488, *reversing Tillou's Case*, (1865) 1 Ct. Cl. 220; *Manley v. Olney*, (1887) 32 Fed. Rep. 709; *Western Transp. Co. v. The Great Western*, (1862) 4 West L. Month. 281, 29 Fed. Cas. No. 17,443; *U. S. v. Wilson*, (1856) 3 Blatchf. (U. S.) 435, 28 Fed. Cas. No. 16,731; *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867; *Roback v. Taylor*, (1866) 2 Bond (U. S.) 36, 20 Fed. Cas. No. 11,877; *Louisiana State Lottery Co. v. Fitzpatrick*, (1879) 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541; *Hubbard v. Northern R. Co.*, (1853) 3 Blatchf. (U. S.) 84, 12 Fed. Cas. No. 6,818.

Legislation is necessary to give effect to this article of the Constitution. *Mutual L. Ins. Co. v. Champlin*, (1884) 21 Fed. Rep. 89.

"The notion has frequently been entertained that the federal courts derive their judicial power immediately from the Constitution, but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, Congress is not bound, and it would perhaps be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the Constitution might warrant." *Per Chase, J.*, in *Turner v. Bank of North America*, (1799) 4 Dall. (U. S.) 10.

The civil jurisdiction of the Circuit Court was, by the Act of March 3, 1875, enlarged to the entire extent of the judicial power delegated to Congress by the terms of the Constitution. *Louisiana State Lottery Co. v. Fitzpatrick*, (1879) 3 Woods (U. S.) 222, 15 Fed. Cas. No. 8,541.

Constitution and statutes must concur. — In order to give jurisdiction to a federal court in any case whatever, the Constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or the law. The two must co-operate; the Constitution as the fountain, and the laws of Congress as the streams from which and through which the waters of jurisdiction flow to the court. This results necessarily from the structure of federal government. It is a government of granted and limited powers. All powers not granted by the Constitution to the federal government nor prohibited to the states are reserved to the states or the people. The great residuum of legislative, executive, and judicial power remains in the states. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 334. See also *In re Barry*, (1844) 42 Fed. Rep. 122; *In re Metzger*, (1847) 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

Congress may give the Circuit Courts original jurisdiction in any case to which the

appellate jurisdiction extends. "The Constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive, and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the state; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States." *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 821.

Congress may withhold jurisdiction of any enumerated controversies. — The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Courts. Consequently, an Act of Congress which does prescribe the limits of their jurisdiction cannot be in conflict with the Constitution unless it confers powers not enumerated therein. Having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. A provision in an Act of Congress defining the jurisdiction of the Circuit Courts which restrains them from taking "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange," is not in conflict with the constitutional provision specifying "controversies between citizens of different states" as a subject of jurisdiction of the federal court. *Sheldon v. Sill*, (1850) 8 How. (U. S.) 448.

Jurisdiction may be changed or taken away. — The jurisdiction of inferior courts is derived from and is subject to the absolute control of Congress, and may be changed or taken away at its pleasure. Existing courts may be abolished, and their jurisdiction in all cases pending in them, whatever their condition, transferred to other existing courts or to new courts. *U. S. v. Haynes*, (1887) 29 Fed. Rep. 696.

As to persons having right to sue. — There are no inherent rights to sue in the United States court, as in the courts of general jurisdiction in the states. The courts themselves were created as tribunals of a special and limited character as to jurisdiction, for the necessities of the federal system; and only those persons can sue in the United States courts or proceed there who are given the right to do so by the United States law. *U. S. v. Lancaster*, (1890) 44 Fed. Rep. 893.

Power to impanel grand jury.—All courts of the United States are creatures of the Constitution and laws of the United States, and have only such jurisdictional powers as are conferred by the Constitution and laws of the United States. The power to impanel a grand jury is not an inherent power of a court of the United States, but is derived from the statute, and the statutory procedure should be followed. *Ex p. Farley*, (1889) 40 Fed. Rep. 67.

Jurisdiction must affirmatively appear.—“A Circuit Court, though an inferior court in the language of the Constitution, is not so in the language of the common law; nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the courts at Westminster long applied to courts of that denomination, but are entitled to as liberal intendments, or presumptions, in favor of their regularity, as those of any Supreme Court. A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace.

And the fair presumption is (not as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears. This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record of a Circuit Court, the facts or circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment.” *Turner v. Bank of North America*, (1799) 4 Dall. (U. S.) 11.

Federalist.—The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the national government to institute or authorize, in each state or district of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits. Hamilton, in *The Federalist*, No. LXXXI.

b. DISTRIBUTION AMONG DIFFERENT INFERIOR TRIBUNALS.—Congress has the power to confer some of the judicial powers enumerated on certain of the inferior tribunals authorized to be established, and other of the powers enumerated on certain other inferior tribunals authorized to be created by the same article.

James v. U. S., (1903) 38 Ct. Cl. 630, the court saying: “This court, for example, is constituted one of those inferior courts which Congress authorizes under Article III.; but the jurisdiction it has of contracts between the government and the citizen from which appeals may be taken directly to the Supreme Court is a larger jurisdiction than that conferred by the Act of March 3, 1887,

24 Stat. L. 505, on other courts of the United States, as by that Act the District and Circuit Courts of the United States are given concurrent jurisdiction with this court, to a limited extent only, of suits against the United States.”

See also *To Distribute the Judicial Power*, 8 FED. STAT. ANNOT. 682.

c. SUCCESSION OF COURTS FOR ORIGINAL AND APPELLATE JURISDICTION.—The exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the most utmost latitude of which, in its own nature, it is susceptible.

Martin v. Hunter, (1816) 1 Wheat. (U. S.) 338, reversing (1814) 4 Munf. (Va.) 1.

In those cases in which original jurisdiction is given to the Supreme Court the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the

exception of those cases in which original jurisdiction is given to the Supreme Court, there is none to which judicial power extends from which the original jurisdiction of the inferior courts is excluded by the Constitution. *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 820.

Congress may give the inferior courts, authorized to be established, such jurisdiction,

both original and appellate, within the limits of the Constitution, as it may see fit to confer. *Home L. Ins. Co. v. Dunn*, (1873) 19 Wall. (U. S.) 226.

The power here under consideration is given in general terms. No limitation is imposed. The broadest language is used. "All cases" so arising are embraced. None are excluded. How jurisdiction shall be acquired by the

inferior courts, whether it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, are not prescribed. The Constitution is silent upon those subjects. They are remitted without check or limitation to the wisdom of the legislature. *Nashville v. Cooper*, (1867) 6 Wall. (U. S.) 251.

III. JURISDICTION NOT EXTENDED BEYOND LIMITS OF CONSTITUTION.—An Act of Congress cannot extend the jurisdiction beyond the limits of the Constitution, and a statute giving jurisdiction to the Circuit Courts in all suits in which an alien is a party is invalid.

Hodgson v. Bowerbank, (1809) 5 Cranch (U. S.) 303.

Acts of Congress giving jurisdiction to the federal courts must be restrained by the Constitution. "Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty." *Owings v. Norwood*, (1809) 5 Cranch (U. S.) 348. See also *Smith v. American Nat. Bank*, (C. C. A. 1898) 89 Fed. Rep. 838; *People v. Murray*, (N. Y. Gen. Sess. 1864) 5 Park. Crim. (N. Y.) 602.

In regulating the judicial department, the cases in which the courts of the United States shall have jurisdiction are particularly and specifically enumerated and defined; and they are not authorized to take cognizance of any case which does not come within the description therein specified. *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 401.

In the distribution of jurisdiction not otherwise distributed and extended by the Constitution itself, Congress may confer all or less

than all of this jurisdiction on different courts of the Union, and may vest such jurisdiction in those courts in an original or appellate form, as it may think best; but in the distribution of jurisdiction the constitutional limit on jurisdiction must be respected and cannot be exceeded. So that jurisdiction, original or appellate, as depending on the subject-matter or character of the litigation, must be limited to cases involving a federal question, and cannot be extended to cases non-federal in their character. *Nashville, etc., R. Co. v. Taylor*, (1898) 86 Fed. Rep. 173.

The limitation of the judicial power of the United States affects not only the powers of the courts of the United States, but the power of Congress to vest and give exercise to such judicial powers. Judicial power is not identical with jurisdiction. It may lie within the power of the legislature, ungranted wholly or in part, and in the latter case the measure of such jurisdiction as may have been lodged would not be the measure of the judicial power that created it. It may safely be affirmed, however, that when the legislature is restricted in the creation of judicial jurisdiction within certain limits, such limits are the measure of the extent of its judicial power. *State v. Davis*, (1879) 12 S. Car. 536.

IV. "CASES" AND "CONTROVERSIES."—If a proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it is not simply ancillary or advisory, but is the final and indisputable basis of action by the parties, it is a "case" within the meaning of this provision.

La Abra Silver Min. Co. v. U. S., (1899) 175 U. S. 457, in which a suit instituted under a special statute to ascertain whether an award, made by a commissioner appointed pursuant to a treaty made with a foreign country for the purpose of investigating a claim made by a corporation against that country, had been obtained by fraud and fraudulent practices on the part of the corporation was held to be a "case" of which the courts could take jurisdiction, as the statute made the determination of the courts the final basis of action. *Affirming U. S. v. La Abra Silver Min. Co.*, (1897) 32 Ct. Cl. 462, (1894) 29 Ct. Cl. 432.

By cases and controversies are intended the claims of litigants brought before the courts

for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication. *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 255.

"Cases are the natural boundary of jurisdiction in one of its directions. In the other direction the character of parties is the bound-

ary. That sense of the word 'case' should then be taken as its intended sense that enables it to serve as the boundary of original jurisdiction where that jurisdiction is described by it. The Constitution, with a nicety of expression, due to the merited influence of the distinguished lawyers who assisted in its preparation, that leaves no doubt as to its intention to use the word 'case' in its technical sense, employs that term when defining the limits of jurisdiction by the nature of its subject-matter, and applies the term 'controversies' where jurisdiction is intended to depend on the character of parties. The instance of 'cases affecting ambassadors,' etc., is not a departure from the order of expression; on the contrary, the form of the expression opens the inference that it was intended to give this jurisdiction a scope beyond the instances where the ambassador or other public minister is a party in a legal sense, as consisting with the use of the word 'cases' instead of 'controversies.'" *State v. Davis*, (1879) 12 S. Car. 539.

Classes of cases.—It is apparent upon the face of this clause that in one class of cases the jurisdiction of the federal courts depends on the character of the cause, whoever may be the parties, and in the other on the character of the parties, whatever may be the subject of controversy. *U. S. v. Texas*, (1892) 143 U. S. 643.

Three classes of cases.—"It will be observed that the judicial power of the United States, under this provision of the Constitution, extends to three classes of cases, determined respectively (1) by the subject-matter of the action wherein the power is exercised; (2) by the parties thereto; and (3) by the remedy to be enforced or course of proceedings adopted. * * * *The first clause* of the section confers judicial power in actions arising under the Constitution, laws, and treaties of the United States. That is, where rights are given or preserved, or liabilities accrue under them, whenever they affect or operate upon parties to actions, to such actions the judicial power of the United States extends. Here, then, the judicial power is determined in a class of cases by the subject-matter of the action. The conditions, character, or citizenship of the parties to the actions have nothing to do with the jurisdiction of the United States courts. For instance, if an action arises between citizens of the same state, under the laws of the United States, the federal courts take jurisdiction thereof. It will

be seen that, in this class of cases, the subject-matter and not the parties is the test of jurisdiction. The federal judicial power in such instances extends to all cases in law and chancery, separate jurisdictions existing in the states when the Constitution was adopted, and which had been found sufficient for the administration of justice to the people. The system of jurisprudence then prevailing was, doubtless, recognized by the framers of the Constitution, and it was intended that all rights arising under the Constitution, laws, and treaties of the United States should be settled by actions in the jurisdictions of law, chancery, and admiralty in which justice was then administered. To this class of actions belong controversies between citizens of the same state claiming lands under grants of different states.

* * * *The second class* of actions are those in which the jurisdiction of the federal courts is determined by the parties. These are all actions against 'ambassadors, other public ministers and consuls,' and 'controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; * * * and between a state or the citizens thereof, and foreign states, citizens, or subjects.' It is very plain that whatever may be the subject-matter of such actions, jurisdiction therein is conferred upon the United States.

* * * *The third class* of cases to which the judicial power of the United States extends is determined by the remedy sought, the course of proceeding had, the form, manner, and forum in which the actions are prosecuted. It is prescribed that the federal jurisdiction shall extend 'to all cases of admiralty and maritime jurisdiction.' The word 'jurisdiction' in this connection relates to the forum and course of proceedings. Thus, we speak of cases of chancery jurisdiction, meaning thereby actions cognizable in a court of chancery within the limits of the authority of chancery courts. In this class the judicial power conferred is limited by the authority of the court of admiralty; cases within its jurisdiction are cognizable in the federal courts. It is readily seen that the parties to such actions have nothing to do in determining the jurisdiction to which they are assigned. And we think it is equally as plain that the same is true of the subject-matter of the action." *Home Ins. Co. v. North Western Packet Co.*, (1871) 32 Iowa 236.

The Use of the Word "Controversies" as in contradistinction to the word "cases," and the omission of the word "all" in respect of controversies, left it to Congress to define the controversies over which the courts it was empowered to ordain and establish might exercise jurisdiction, and the manner in which this was to be done.

Stevenson v. Fain, (1904) 195 U. S. 167.

A controversy, in the contemplation of the Constitution, is but a dispute concerning

rights or wrongs cognizable by law, and which may therefore be the subject of an action or involved therein. *Fisk v. Henarie*, (1887) 32 Fed. Rep. 423.

The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and in-

cludes only suits of a civil nature. *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 255.

V. "IN LAW AND EQUITY"—1. Distinction Between Law and Equity. —

In creating and defining the judicial power of the general government the situation establishes the distinction between law and equity; and a party who claims a legal title must proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one he must proceed according to rules which have been prescribed by the Supreme Court of the United States regulating proceedings in equity in the courts of the United States.

Bennett v. Butterworth, (1850) 11 How. (U. S.) 674. See also *Anglo-American Land, etc. Co. v. Lombard*, (C. C. A. 1904) 132 Fed. Rep. 731; *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. Rep. 506.

See also the title *Judiciary*, 4 FED. STAT. ANNOR. 265, 312.

"In every instance in which this court has expounded the phrases 'proceedings at the common law' and 'proceedings in equity,' with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to rights and obligations essentially legal; and the latter as meaning the administration with reference to equitable as contradistinguished from legal rights, of the equity law as defined and enforced by the Court of Chancery in England." *Fenn v. Holme*, (1858) 21 How. (U. S.) 484.

"The Constitution of the United States and the Acts of Congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of state

courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." *Thompson v. Railroad Cos.*, (1867) 6 Wall. (U. S.) 137.

In determining the relative jurisdiction over actions at law and suits in equity, it becomes necessary, under our judicial system, to consider (1) the subject-matter, (2) the relief, (3) its application, (4) the competency of a court of law to afford it. These are the tests, and their application is not to be regulated by the decisions of the state courts, whose judicial system in many instances is organized on a principle wholly inconsistent with that upon which the federal courts are organized. The courts of the United States are courts of limited jurisdiction, which must be exercised in the mode pointed out by the Constitution and Acts of Congress. They are without power to do away with the distinction between law and equity, the forms used and the causes and reasons which distinguish the one from the other, even if they were so inclined. *Smith v. American Nat. Bank*, (C. C. A. 1898) 89 Fed. Rep. 839.

2. Uniform Equity Jurisdiction in All the States.—The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the states. Their practice is regulated by themselves and by rules established by the Supreme Court.

Noonan v. Lee, (1862) 2 Black (U. S.) 509. See also *Payne v. Hook*, (1868) 7 Wall. (U. S.) 430.

As the courts of the Union have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in one state must be the same as in other states. *U. S. v. Howland*, (1819) 4 Wheat. (U. S.) 115.

"Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts

of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable thereto. These principles may make part of the law of a state, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several states. But in all the states, the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court." *Neves v. Scott*, (1851) 13 How. (U. S.) 272.

3. According to Jurisdiction of High Court of Chancery in England. — The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses.

Payne v. Cook, (1868) 7 Wall. (U. S.) 430.

The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be

said to be the common law of chancery, and since the organization of the government it has been observed. *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1851) 13 How. (U. S.) 563.

4. Unaffected by State Legislation. — The equity jurisdiction conferred on the federal courts is subject to neither limitation nor restraint by state legislation.

Payne v. Hook, (1868) 7 Wall. (U. S.) 430. See also *Noonan v. Lee*, (1862) 2 Black (U. S.) 509.

In exercising chancery jurisdiction, the courts of the Union are not limited by the

chancery system adopted by any state, and they exercise their functions in a state where no court of chancery has been established. *Pennsylvania v. Wheeling, etc., Bridge Co.*, (1851) 13 How. (U. S.) 563.

Although the Forms of Proceedings and Practice in the State Courts Have Been Adopted in the Circuit Courts of the United States, yet the adoption of the state practice cannot have the effect of confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit.

Lindsay v. Shreveport First Nat. Bank, (1895) 156 U. S. 493. See also *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. Rep. 731.

See sections 914, 915, and 916, R. S., under title *Judiciary*, 4 FED. STAT. ANNOT. 563, 577, 580.

Creating liens of mechanics and materialmen. — A Circuit Court on the law side cannot follow a remedy provided by a state statute creating the lien of mechanics, employees, and materialmen, in so far as the remedy there given is essentially equitable in its nature rather than legal. *De La Vergne Refrigerating Mach. Co. v. Montgomery Brewing Co.*, (1891) 46 Fed. Rep. 831.

5. Right of Trial by Jury Preserved by Seventh Amendment. — The distinction of jurisdiction between law and equity is constitutional to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.

Root v. Lake Shore, etc., R. Co., (1881) 105 U. S. 206.

The terms "law" and "equity," as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the states, as in

cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, neglect, or default of another, but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law. *Ellis v. Davis*, (1883) 109 U. S. 497.

6. Power of Congress to Define a Case in Equity. — In the absence of express statutory provisions, such as those recognizing and enforcing a resulting trust, the jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily implied by and under the Constitution and laws of the United States. Those courts are created courts of the common law and equity; and under whichever of these classes of jurisprudence such rights or duties may fall, or be appropriately ranged, they are to be taken cognizance of and adjudicated according to the settled and known principles of that division to which they belong.

Irvine v. Marshall, (1857) 20 How. (U. S.) 564.

Congress has the power to define what shall be a case in equity by declaring what the common law was which drew the line between the courts of law and equity, and there can be no doubt that, when so declared, that

declaration is obligatory upon the federal courts by superadding the authority of the legislative department of the government to that of the common law, so as not to leave the line of separation discretionary with the judges. *Smith v. American Nat. Bank*, (C. C. A. 1898) 89 Fed. Rep. 838.

7. Proceedings in Equity to Restrain Combinations in Restraint of Trade. — Congress has power to authorize civil proceedings in equity to suppress and restrain combinations and conspiracies to accomplish the obstruction of interstate commerce and trade before it is accomplished.

U. S. v. Elliott, (1894) 64 Fed. Rep. 31.

8. For Discovery of Assets of Judgment Debtor. — A proceeding for the discovery of the assets of a judgment debtor in aid of an execution at law provided for by a state statute, and applied under section 916, R. S., is not in conflict with this clause which preserves and establishes the distinction between relief at law and in equity.

Ex p. Boyd, (1881) 105 U. S. 647.

9. Proceeding to Perpetuate Testimony. — Proceedings to perpetuate testimony, where litigation is expected or apprehended, are within the ordinary jurisdiction of courts of equity, and come under the designation of "cases in equity" in the Constitution.

Matter of Pacific R. Commission, (1887) 32 Fed. Rep. 257.

10. Authorizing Court of Equity to Impose Penalty. — The Act of Feb. 4, 1887, in regard to design patents, provides that "any person violating the provisions, or either of them, of this section, shall be liable in the amount of two hundred and fifty dollars; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the sum of two hundred and fifty dollars. And the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any Circuit Court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement." It is not invalid in giving a court of equity jurisdiction of penalties, as Congress has the right to confer this authority upon a court of equity as incidental to the exercise of its ordinary jurisdiction.

Untermeyer v. Freund, (C. C. A. 1893) 58 Fed. Rep. 210, citing *Stevens v. Gladding*, (1854) 17 How. (U. S.) 454, and *Stevens v. Cady*, (1854) 2 Curt. (U. S.) 200, 23 Fed.

Cas. No. 13,395, and affirming *Untermeyer v. Freund*, (1892) 50 Fed. Rep. 77.

See title *Patents*, 5 FED. STAT. ANNOT. 603.

VI. ARISING UNDER CONSTITUTION, LAWS, AND TREATIES — 1. As Dependent on Construction of Constitution, Law, or Treaty. — A case arising under the Constitution and laws of the United States is not merely one where a party comes into court to demand something conferred upon him by the Constitution or

by a law or treaty. A case consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.

Tennessee v. Davis, (1879) 100 U. S. 264.

See Act of March 3, 1875, sec. 1, as amended, under title *Judiciary*, 4 FED. STAT. ANNOT. 280.

A defense interposed to an indictment in a state court under the laws of the state, depending for its force and effect upon the Constitution and laws of the United States, is not a case arising under the Constitution and laws of the United States in the sense of the Constitution. *State v. Davis*, (1879) 12 S. Car. 541, in which case the court said: "A case can be said to arise under the Constitution, laws, and treaties of the United States only when the law propounded as the ground of demanding judgment has its force under that source of authority. If a defendant cannot claim affirmative relief his position is purely

defensive, and the matter of his defense is always regarded as incidental to the main question, and, as such, does not enter into the legal description of the nature of the case. When such a defendant asserts title or claim in himself to defeat that set up by the plaintiff, the whole force of his defense is to negative the grounds on which the plaintiff demands judgment, each defensive ground not amounting to the introduction of a new and counter cause of action. Where the defendant is entitled to affirmative relief, his matter of defense assumes the form of a cause of action. In that case considerations of a different character would present themselves which cannot properly be discussed in the present case, as it does not possess that

The Construction of Treaties is the peculiar province of the judiciary, and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty or to affect titles already granted by the treaty itself.

Jones v. Meehan, (1899) 175 U. S. 1.

2. Civil and Criminal Causes.—Provision that the judicial power shall "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," embraces alike civil and criminal cases arising under the Constitution and laws. Both are equally within the dominion of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one.

Tennessee v. Davis, (1879) 100 U. S. 264.

3. Rights and Obligations Conferred and Imposed by Act of Congress.—An Act of Congress authorizing a suit to be brought about matters arising under an Act of Congress which chartered a railroad company and conferred on it certain rights and benefits, and imposed on it certain obligations, is a subject of which Congress may give the federal courts jurisdiction.

U. S. v. Union Pac. R. Co., (1878) 98 U. S. 602, holding that an Act of Congress, which required the attorney-general to institute a suit in equity in the name of the United States against the Union Pacific Railroad Company and against all persons who may, in their own names or through any agents, have subscribed for or received capital stock in the said road, which had not been paid for in full, or had been received unlawfully and contrary to equity, and made special

provisions for the bringing of such parties before the court, and was intended not to change the substantial rights of the parties to the suit which it authorized, but to provide a specific method of procedure, which, by removing restrictions on the jurisdiction, process, and pleading in ordinary cases, would give a larger scope for the action of the court, and a more economical and efficient remedy than before existed, was a valid and constitutional exercise of legislative power.

4. When Other Questions of Fact or Law Involved. — When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Osborn v. U. S. Bank, (1824) 9 Wheat. (U. S.) 821, wherein the court said: "A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings."

Congress may give jurisdiction to the United States courts of suits involving questions arising under the Constitution, laws, or treaties of the United States, although other questions of fact or law be involved, and this jurisdiction can be given as well by the pro-

cess of removal as by the original institution of the suit in the federal court, or as by an appeal or writ of error. *Fisk v. Union Pac. R. Co.*, (1869) 6 Blatchf. (U. S.) 362, 9 Fed. Cas. No. 4,827.

A single federal purpose or ground of jurisdiction would be sufficient in the exercise of the constitutional power in Congress to vest a Circuit Court with jurisdiction, although some of the defendants are residents of the same state as the plaintiff. *Whelan v. New York, etc., R. Co.*, (1888) 35 Fed. Rep. 859, in which case the court said: "It results necessarily from the supremacy of the Federal Constitution, and the laws passed by Congress within the limits of the powers conferred, that a single federal object may control the question of jurisdiction even when the suit includes or relates to other matters or parties which come properly within the local jurisdiction," and cited *Gordon v. Longest*, (1842) 16 Pet. (U. S.) 104, and *Barney v. Lathan*, (1880) 103 U. S. 205.

5. Regardless of Parties to Suit. — A case arising under the Constitution or laws of the United States is cognizable in courts of the Union, whoever may be the parties to that case, and an exception does not exist in those cases in which the state may be a party.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 383.

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.

That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States." *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 819.

6. Suit Against a State by a Citizen of the State. — This clause does not give the right to bring a suit in a federal court against a state by a citizen of that state in a case arising under the Constitution and laws of the United States.

Hans v. Louisiana, (1890) 134 U. S. 9, affirming (1885) 24 Fed. Rep. 55. See also *North Carolina v. Temple*, (1890) 134 U. S. 30.

7. Suit to Set Aside a Patent for Land. — The attorney-general as the head of the department of justice has the right to institute, in the name of the United States, a suit to abrogate, annul, or set aside a patent for land which has been issued by the government, in a case where such an instrument, if permitted to stand, would work serious injury to the United States and prejudice its interest, and where it has been obtained by fraud, imposture, or mistake.

U. S. v. San Jacinto Tin Co., (1888) 125 U. S. 285. See also *U. S. v. Beche*, (1888) 127 U. S. 343.

8. Suits By and Against Bank of United States. — The Act of Congress incorporating the Bank of the United States, and giving the Circuit Courts of the United States jurisdiction of suits by and against the bank, is constitutional.

Osborn v. U. S. Bank, (1824) 9 Wheat. (U. S.) 738.

9. Over Domestic Relations. — The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States. The right to control and possession of a child, as contested by its father and its grandfather, is one in regard to which neither Congress nor any authority of the United States has any special jurisdiction, when whether the one or the other is entitled to the possession does not depend upon any Act of Congress, or any treaty of the United States or its Constitution.

In re Burrus, (1890) 136 U. S. 595, wherein the court said: "So far as the question whether the custody of a child can be brought into litigation in a Circuit Court of the United States, even where the citizenship of the opposing parties is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of *Barry v. Mercein*. (1847) 5 How. (U. S.) 103. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the Circuit Courts by declaring that they

shall have original cognizance, concurrent with the courts of the several states, of all civil suits arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the Constitution, laws, or treaties of the United States and is not dependent on them."

VII. "OF ADMIRALTY AND MARITIME JURISDICTION" — 1. Exclusiveness of Admiralty and Maritime Jurisdiction — a. IN GENERAL. — The admiralty and maritime jurisdiction conferred by the Constitution and laws of the United States upon the District Courts of the United States is exclusive.

The Glide, (1897) 167 U. S. 623.

See section 563, R. S., under title *Judiciary*, 4 FED. STAT. ANNOT. 220.*

The exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power. The admiralty court is a maritime court instituted for the purpose of administering the law of the seas. There seems to be ground, therefore, for restraining jurisdiction, in some measure, within the limit of the grant of the commer-

cial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries, and among the several states. *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. (U. S.) 392.

Admiralty jurisdiction exists and is exercised in the United States, under and by virtue of the Constitution and laws, and independently of the navigation laws of Congress. *The General Cass*, (1871) Brown Adm. 334, 10 Fed. Cas. No. 5,307.

Entire Admiralty Power Lodged in Federal Courts. — The entire admiralty power of the Constitution was lodged in the federal courts.

American Steamboat Co. v. Chase, (1872) 16 Wall. (U. S.) 522. See also *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. (U. S.) 390.

Within the cognizance of this jurisdiction are all affairs relating to vessels of trade, and the owners thereof, as such; and all matters which concern owners, proprietors of ships as such — all causes of pawning, hypothecating, or pledging of the ship or vessel itself, or any part thereof, at sea, and whatever is of a maritime nature, either by way of navigation upon the seas, or negotiation at or beyond the sea, in the way of maritime

trade or commerce — also the nautic right which maritime persons have in ships, their tackle, etc.; likewise all causes of out-riggers, furnishers, owners, and part owners of ships, as such. *Stevens v. The Sandwich*, (1801) 1 Pet. Adm. 233, 23 Fed. Cas. No. 13,409.

Jurisdiction conferred on District Courts. — The Constitution leaves to the discretion of Congress the distribution of the subjects and cases which they think proper to establish. In the exercise of that discretion, Congress, in 1789, declared that the District Courts should have "exclusive original cognizance of

all civil causes of admiralty and maritime jurisdiction;" thus conferring upon the District Courts, in respect to civil causes, as full and ample unlimited original jurisdiction, in admiralty, as it was in the power of the national government to confer upon the national courts. *Western Transp. Co. v. The Great Western*, (1862) 4 West. L. Month. 281, 29 Fed. Cas. No. 17,443.

Whether considered as an instance or as a prize court, every District Court possesses all the powers of a court of admiralty. *Glass v. The Sloop Betsey*, (1794) 3 Dall. (U. S.) 6.

All admiralty jurisdiction refers directly or indirectly to navigation. It is the vessel and its navigation, and the crimes, torts, and

contracts growing out of it, that form the objects of admiralty jurisdiction. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 335.

Cases of seizure on the high seas or the navigable waters of the United States, for the violation of any law thereof, are cases of admiralty and maritime jurisdiction. *The Idaho*, (1886) 29 Fed. Rep. 189.

Not limited by the rules of the common law.—The general jurisdiction of the courts of the United States in admiralty and maritime cases is not limited by the rules of the common law. *The Stephen Allen*, (1830) Blatchf. & H. Adm. 175, 22 Fed. Cas. No. 13,361.

b. STATE JURISDICTION OVER SEACOAST.—Within what are generally recognized as the territorial limits of states by the law of nations, a state can define its boundaries on the sea, and the boundaries of its counties, and a state has jurisdiction, within such territorial limits, of offenses not punishable under Acts of Congress.

Manchester v. Massachusetts, (1891) 139 U. S. 264. See *U. S. v. Bevans*, (1818) 3 Wheat. (U. S.) 390.

A state statute creating a civil liability for an act causing the death of another may be

enforced in a court of admiralty when the act complained of occurred within the maritime territorial limits of the state. *Humboldt Lumber Manufacturers' Assoc. v. Christopherson*, (C. C. A. 1896) 73 Fed. Rep. 239.

c. CONCURRENT JURISDICTION AT COMMON LAW.—Wherever the District Courts of the United States have original cognizance of admiralty causes by virtue of an Act of Congress, that cognizance is exclusive with the exception always of such concurrent remedy as is given by the common law.

The Hine v. Trevor, (1866) 4 Wall. (U. S.) 555. See also *The Moses Taylor*, (1866) 4 Wall. (U. S.) 430; *De Lovio v. Boit*, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

Neither a jury trial nor the concurrent jurisdiction of the common-law courts can be a test for jurisdiction in admiralty. *Waring v. Clarke*, (1847) 5 How. (U. S.) 459.

Personal suits in state courts.—Under the grant by the Constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of Congress, personal suits on marine contracts or for maritime torts can be maintained in the state courts. *Manchester v. Massachusetts*, (1891) 139 U. S. 262, affirming *Com. v. Manchester*, (1890) 152 Mass. 230. See also *Dunham v. Lamphere*, (1855) 3 Gray (Mass.) 268.

Story's views approved.—The relation of the District Courts, as courts of admiralty, is defined with exactness and precision by Justice Story in his Commentaries on the Constitution. He says; "Mr. Chancellor Kent and Mr. Rawle seem to think that the admiralty jurisdiction given by the Constitution is, in all cases, necessarily exclusive. But it is believed that this opinion is founded on mistake. It is exclusive in all matters of prize, for the reason that, at the common law,

this jurisdiction is vested in the courts of admiralty, to the exclusion of the courts of common law. But in cases where the jurisdiction of common law and admiralty are concurrent (as in cases of possessory suits, mariners' wages, and marine torts), there is nothing in the Constitution necessarily leading to the conclusion that the jurisdiction was intended to be exclusive; and there is no better ground, upon general reasoning, to contend for it. The reasonable interpretation," continues the commentator, "would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the states could have no right to create courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the states might well retain and exercise the jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law. This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction." *Taylor v. Carryl*, (1857) 20 How. (U. S.) 598.

Power of Congress to render admiralty jurisdiction exclusive. — The grant of the civil jurisdiction of the admiralty is not necessarily exclusive, and a denial of the exercise of the power of the states until Congress acts upon the subject. There are certainly very strong grounds for maintaining that, in those cases where, previous to the formation of the general government, the state tribunals possessed and were in the constant habit of exercising jurisdiction, they may continue to exercise the same where the common law affords a full and adequate remedy. The *Schooner Wave v. Hyer*, 2 Paine (U. S.) 131, 29 Fed. Cas. No. 17,300. But see *The Ferry Steamer Norfolk*, (1877) 2 Hughes (U. S.) 123, 18 Fed. Cas. No. 10,297; *The Huntsville*, (1871) 8 Blatchf. (U. S.) 228, 12 Fed. Cas. No. 6,916.

Though the admiralty and maritime jurisdiction is not, by the terms of the Constitution, declared to be exclusive, yet the jurisdiction may by Congress be rendered exclusive. *Chisholm v. Northern Transp. Co.*, (1872) 61 Barb. (N. Y.) 388.

The judicial power of the United States, in admiralty cases, is limited by the proceed-

ings had, the form, manner, and forum in which actions, under the law in that jurisdiction, are prosecuted; and exclusive jurisdiction is not bestowed upon the federal courts over subjects which may be the foundation of actions in admiralty, and also according to the course of the common law, in chancery or at law. In such cases the state courts have concurrent jurisdiction with the United States admiralty courts. That such is the congressional interpretation of the Constitution of the United States, and that, if under the clause in question the exclusive judicial power in admiralty cases may be assumed by the United States, it has not been but is preserved to the states, is made plain by the Act of Congress of the 24th of Sept., 1789, section 9, which is in these words: "The District Courts * * * shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." *Home Ins. Co. v. North Western Packet Co.*, (1871) 32 Iowa 242.

2. As Understood at Time Constitution Adopted — a. IN GENERAL. — The true limits of admiralty and maritime jurisdiction can only be ascertained by reference to what cases were cognizable in the maritime courts when the Constitution was formed. What was reserved to the states, to be regulated by their own institutions, cannot be rightfully infringed by the general government, either through its legislative or judiciary department.

People's Ferry Co. v. Beers, (1857) 20 How. (U. S.) 401. See also *Murray v. Chicago, etc., R. Co.*, (1894) 62 Fed. Rep. 28.

Jurisdiction in admiralty under the Constitution of the United States and laws of Congress must be determined by a just reference to the laws of the states and the usages of the courts prevailing in the states at the time when the Constitution was adopted. No other rules are known, which it is reasonable to suppose could have been in the minds of the men who framed the Constitution and organized the judicial system of the United States, than those which were then in force in the respective states, and which they were accustomed to see in the daily and familiar practice in the state courts. Many of the laws and usages were the same as those then acknowledged in England, and to that extent the admiralty decisions in the state courts and those made in the courts of the parent country and of the commercial countries of continental Europe, when analogous, furnish a common guide. *Cunningham v. Hall*, (1858) 1 Cliff. (U. S.) 43, 6 Fed. Cas. No. 3,481.

Admiralty was a jurisdiction limited and defined by the statute and common law; its boundaries had been declared by adjudica-

tions in the courts of the states, so recently before the framing of the Constitution in convention, that they must have been familiar to the members. To the states in which courts of admiralty had been long held, its jurisdiction was well known, and in the absence of any judicial authority under the governments of the states, in opposition to what has been referred to, we must consider this jurisdiction to have been granted precisely as it had been previously exercised. *Bains v. The Schooner James and Catherine*, (1832) Baldw. (U. S.) 544, 2 Fed. Cas. No. 756.

The clause extending the judicial power to all cases of admiralty and maritime jurisdiction manifestly embraces those subjects, whether of contract or tort, which were then, under the general maritime law, the appropriate subjects of the jurisdiction of courts of admiralty. There were cases upon and contracts pertaining to the navigation of the high seas, in contradistinction to contracts made or to be executed on land, or to torts of the same character as to locality, comprehending navigable rivers in which the tide ebbed and flowed. *Scott v. The Propeller Young America*, (1856) Newb. Adm. 101, 21 Fed. Cas. No. 12,549.

b. NOT LIMITED BY ENGLISH ADMIRALTY LAW. — The admiralty jurisdiction extends to localities and subjects which, by the jealousy of the common law,

were prohibited to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in colonial times.

The *Lottawanna*, (1874) 21 Wall. (U. S.) 576. See also *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. (U. S.) 392; *Waring v. Clarke*, (1847) 5 How. (U. S.) 459; *Steele v. Thatcher*, (1825) 1 Ware (U. S.) 91, 22 Fed. Cas. No. 13,348; *De Lovio v. Boit*, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776; *Cunningham v. Hall*, (1858) 1 Cliff. (U. S.) 43, 6 Fed. Cas. No. 3,481. But see *Woodruff v. The Levi Dearborne*, (1811) 4 Hall Law J. 97, 30 Fed. Cas. No. 17,988; *Thompson v. The Ship Catharina*, (1795) 1 Pet. Adm. 104, 23 Fed. Cas. No. 13,949.

Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the Constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an Act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government. *The Steamer St. Lawrence*, (1861) 1 Black (U. S.) 526.

The admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts. First, as to the locus or territory of maritime jurisdiction; that is, the place or territory where the law maritime prevails, where torts must be committed, and where the business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land-locked or open, salt or fresh, tide or no tide. Secondly, as to contracts, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making locality the test), is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. *New England Mut. Marine Ins. Co. v. Dunham*, (1870) 11 Wall. (U. S.) 24.

Originally the Court of Admiralty in England entertained jurisdiction of petitory as well as of mere possessory actions. Since the Restoration, that court, through the jealous interference of courts of law, had ceased to pronounce directly on questions of ownership or property. Petitory suits were silently abandoned, and, if in a possessory action a question of mere property arose, especially of a more complicated nature, it declined to interfere. *Ward v. Peck*, (1855) 18 How. (U. S.) 267.

Except as adopted by statute, the general maritime law is not the law of this country. *The Sacramento*, (1904) 131 Fed. Rep. 374.

3. Not Limited to Tide Waters.—The lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted, and an Act of Congress extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same, and declaring that these courts shall have, possess, and exercise the same jurisdiction in matters of contract and tort arising in, or upon, or concerning steamboats or other vessels of twenty tons burden and upwards, enrolled and licensed for

the coasting trade and at the time employed in business of commerce and navigation between ports and places in different states and territories, as was at the time of the passage of the Act possessed and exercised by the District Courts in cases of like steamboats and other vessels employed in navigation and commerce on the high seas or tide waters within the admiralty and maritime jurisdiction of the United States, is constitutional. The fact there is no tide in the lakes or the waters connecting them does not make such waters unsuitable for admiralty jurisdiction.

The Propeller *Genesee Chief v. Fitzhugh*, (1851) 12 How. (U. S.) 451, wherein the court said: "At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen states the far greater part of the navigable waters are tide waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated, as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide water must be the limits of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of *The Steamboat Thomas Jefferson*, (1825) 10 Wheat. (U. S.) 428, was decided in this court, and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. *The Steam Boat Orleans v. Phœbus*, (1837) 11 Pet. (U. S.) 175, afterwards followed this case, merely as a point decided. * * * The nature of the questions concerning the

extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering. The point in dispute has generally been whether the jurisdiction was not as limited in the United States as it was in England at the time the Constitution was adopted. And if it was so limited, then it did not extend to contracts for maritime services when made on land, nor to torts and collisions on a tide-water river, if they took place in the body of a country. The attention of the court, therefore, in former cases, has been generally strongly attracted to that question, and never, we believe, until recently, drawn to the one we are now discussing, except in the case of *The Thomas Jefferson*, afterwards followed in *The Steam Boat Orleans v. Phœbus*, as already mentioned. For, with this exception, the cases always arose on contracts for services on tide water, or were upon libels for collisions or other torts committed within the ebb and flow of the tide. There was, therefore, no necessity for inquiring whether the jurisdiction extended further in a public navigable water. And following the English definition, tide was assumed and spoken of as its limit, although that particular question was not before the court. * * * It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." See also *Fretz v. Bull*, (1851) 12 How. (U. S.) 466; *Franconet v. The Propeller F. W. Baekus*, (1852) Newb. Adm. 1, 9 Fed. Cas. No. 5,048; *U. S. v. Wilson*, (1856) 3 Blachf. (U. S.) 435, 28 Fed. Cas. No. 16,731; *Williams v. The Barge Jenny Lind*, (1853) Newb. Adm. 443, 28 Fed. Cas. No. 17,723.

Limit of territorial jurisdiction over tide waters.—"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly

within its territory not exceeding two marine leagues in width at the mouth are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish, or free-moving fish, or fish attached to or embedded in the soil. The open sea within this limit is, of course, subject to the common right of navigation; and

all governments, for the purpose of self-protection in time of war or for the prevention of frauds on its revenue, exercise an authority beyond this limit." *Manchester v. Massachusetts*, (1891) 139 U. S. 258, *affirming Com. v. Manchester*, (1890) 152 Mass. 230. See also *Dunham v. Lamphere*, (1855) 3 Gray (Mass.) 268.

The Entire Navigable Waters of the United States are covered by the admiralty jurisdiction, to which the power of the federal judiciary is declared to extend.

The Hine v. Trevor, (1846) 4 Wall. (U. S.) 569. See also *The Robert W. Parsons*, (1903) 191 U. S. 26.

A canal wholly within the limits of a state, connecting navigable waters, is within the admiralty and maritime jurisdiction. *The Robert W. Parsons*, (1903) 191 U. S. 26. See also *Ex p. Boyer*, (1884) 109 U. S. 629.

"Under the English system, the ebb and flow of the tide, with few if any exceptions, established the fact of navigability; and this was the course of decision in this country, until recently. The vast extent of our fertile country, its increasing commerce, its inland seas, bays, and rivers, open to us a com-

mercial prosperity in the future which no nation ever enjoyed. Our contracted views of the English admiralty, which was limited by the ebb and flow of the tide, were discarded, and the more liberal principles of the civil law, equally embraced by the Constitution, were adopted. This law is commercial in its character, and applies to all navigable waters, except to a commerce exclusively within a state. Many of our leading rivers are sometimes unnavigable; but this cannot affect their navigability at other times. A commerce carried on between two or more states is, subject to the laws and regulations of Congress, and to the admiralty jurisdiction." *Nelson v. Leland*, (1859) 22 How. (U. S.) 55.

4. Beyond High-water Mark. — When the doctrine was held that admiralty jurisdiction in cases purely dependent upon the locality of the act done was limited to the sea and to tide waters as far as the tide flows, and that it did not reach beyond high-water mark, it was said that mixed cases may arise, and indeed do often arise, where the acts and services done are of a mixed nature, as where salvage services are performed partly on tide waters, and partly on the shore, for the preservation of the property saved, in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage.

U. S. v. Coombs, (1838) 12 Pet. (U. S.) 75.

5. Maritime Contracts, Torts, and Crimes — a. MARITIME CONTRACTS — (1) In General. — The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.

People's Ferry Co. v. Beers, (1857) 20 How. (U. S.) 401. See *De Lovio v. Boit*, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

Cases of maritime jurisdiction include all maritime contracts, torts, and injuries which are in the understanding of the common law, as well as of the admiralty, causes civil and maritime. *De Lovio v. Boit*, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

The subject-matter is the test of a marine

contract. A contract appertaining to commerce and navigation, wherever made, to be performed on the navigable waters of the United States, is in general a marine contract. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 336.

Whether to be performed on land or water. — Jurisdiction attaches in case of a maritime contract irrespective of the question whether it is to be performed on land or water. *Dailey v. New York*, (1904) 128 Fed. Rep. 798.

(2) Contracts for Hire of Seamen. — Section 24, of the Act of Congress of Dec. 21, 1898, entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce" (30 Stat.

L. 775), in prohibiting the prepayment of the wages of seamen, is a constitutional enactment, applying to the prepayment on American soil or in American waters of the wages of seamen, who are British subjects, shipping in American ports on British merchant vessels; there being no treaty between the United States and Great Britain inconsistent with such application.

The *Kestor*, (1901) 110 Fed. Rep. 432. See the title *Seamen*, 6 FED. STAT. ANNOT. 872.

When it was considered that the admiralty jurisdiction was limited to the open sea and to tide waters, it was held that the District Court, as a court of admiralty, had not jurisdiction of a suit over wages earned on the voyage from the shipping port in the state of Kentucky up the river Missouri and back again to the port of departure. "In respect

to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise, any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit which it was not at liberty to transcend." The *Steamboat Thomas Jefferson*, (1825) 10 Wheat. (U. S.) 429.

(3) *Contract of Affreightment*. — A suit upon a contract of affreightment for the purpose of recovering a large amount of specie lost in a steamer which took fire and was consumed on Long Island Sound, about four miles off Huntington lighthouse, and between forty and fifty miles from the city of New York, was held to be within admiralty jurisdiction.

New Jersey Steam Nav. Co. v. Merchants' Bank, (1848) 6 How. (U. S.) 378.

(4) *Agreement of Consortship*. — An agreement or a stipulation of consortship is a contract capable of being enforced in the admiralty against property or proceeds in the custody of the court.

Andrews v. Wall, (1845) 3 How. (U. S.) 572.

(5) *Policy of Insurance as a Maritime Contract*. — A policy of insurance is a maritime contract, and therefore of admiralty jurisdiction.

De Lovio v. Boit, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

b. MARITIME TORTS. — Admiralty jurisdiction rests upon the grant in the Constitution. The courts of the United States proceeding as courts of admiralty and maritime jurisdiction have jurisdiction in cases of maritime torts *in personam* as well as *in rem*.

Manro v. Almeida, (1825) 10 Wheat. (U. S.) 493. See also *De Lovio v. Boit*, (1815) 2 Gall. (U. S.) 398, 7 Fed. Cas. No. 3,776.

With respect to marine torts the test of admiralty jurisdiction is locality. A marine tort cannot be made to depend upon the kind of commerce in which the ship is employed. If a marine tort be committed anywhere upon navigable water of the United States, whether the ship or vessel be engaged in commerce wholly domestic to a state or interstate, the case is one of admiralty and maritime jurisdiction. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 336.

The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts it depends entirely on locality. If the wrong be committed on the high seas, or within the ebb and flow of the tide, it has never been disputed that it comes within the jurisdiction of that court. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, (1859) 23 How. (U. S.) 215. See also *Chisholm v. Northern Transp. Co.*, (1872) 61 Barb. (N. Y.) 388.

c. MARITIME CRIMES AND OFFENSES. — The courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no jurisdiction of maritime crimes and offenses. The

criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States.

Manchester v. Massachusetts, (1891) 139 U. S. 262, *affirming* *Com. v. Manchester*, (1890) 152 Mass. 230. See also *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 336; *The Schooner Wave v. Hyer*, 2 Paine (U. S.) 131, 29 Fed. Cas. No. 17,300.

The grant of power to Congress to regulate foreign commerce, and the declaration that

the judicial power shall extend to all cases of admiralty and maritime jurisdiction, do not enable a court to punish any act as a crime, unless some part of the Constitution, or a treaty, or some law of Congress, makes it a crime, and confers authority on that court to punish it. *U. S. v. New Bedford Bridge*, (1847) 1 Woodb. & M. (U. S.) 401, 27 Fed. Cas. No. 15,867.

6. Power of Congress to Legislate over Maritime Law — a. IN GENERAL. —

The power of Congress to make amendments of the maritime law of the country is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends.

In re Garnett, (1891) 141 U. S. 12.

"The Constitution, in defining the powers of the courts of the United States, extends them to 'all cases of admiralty and maritime jurisdiction.' It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the northern fresh-water lakes not 'navigable from the sea,' the District Courts could not assume it by virtue of this clause in the Constitution. An Act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress." *Jackson v. The Steamboat Magnolia*, (1857) 20 How. (U. S.) 300.

Whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. *U. S. v. Bevans*, (1818) 3 Wheat. (U. S.) 389.

"Aside from the grant of power to regulate foreign and interstate commerce, the Constitution, it must be remembered, contains no direct grant to Congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established (*Butler v. Boston, etc., Steamship Co.*, (1889) 130 U. S. 527; *In re Garnett*, (1891) 141 U. S. 1), rests upon

implication only. The grounds of this implication, briefly stated, are that the Constitution, in extending the judicial power to all cases of maritime jurisdiction, presupposes a certain body of maritime law as its necessary attendant; that this law is not only a matter of interstate and international concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment by liability to the diverse legislation of numerous states; and that it cannot be supposed that the states, in parting with all control over the judicial administration of maritime causes, intended to reserve to themselves a general legislative power over the same subject; and that Congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law." *The City of Norwalk*, (1893) 55 Fed. Rep. 105, *affirmed in* *The Transfer No. 4*, (C. C. A. 1894) 61 Fed. Rep. 364. See *The Katie*, (1889) 40 Fed. Rep. 493.

May modify the practice of the court. — "The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore, in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice." *The Propeller Genesee Chief v. Fitzhugh*, (1851) 12 How. (U. S.) 460.

Congress Has Authority under the Commercial Power, if no other, to introduce such changes as are likely to be needed.

The *Lottawanna*, (1874) 21 Wall. (U. S.) 577, wherein the court said: "It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable."

The admiralty jurisdiction of the United States is a part of its judicial power, and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction."

And while it does not authorize Congress to create admiralty cases, yet if, in the exercise of its power derived from other clauses of the Constitution, it should do so, as the power to regulate commerce, the grant of judicial power would extend to them, and include them, because in their nature and constituents they would be cases of admiralty and maritime jurisdiction. The *City of Salem*, (1889) 37 Fed. Rep. 849.

The Extent of the Commercial Power Cannot Be Depended on to maintain the validity of a grant of jurisdiction to the federal courts. "They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations."

The *Propeller Genesee Chief v. Fitzhugh*, (1851) 12 How. (U. S.) 452. See also *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 331; *Western Transp. Co. v. The Great Western*, (1862) 4 West. L. Month. 281, 29 Fed. Cas. No. 17,443.

No. 11,239, affirming (1859) 19 Fed. Cas. No. 11,238.

The line of jurisdiction, whatever it may be, whether of admiralty or of common-law cognizance, in the federal government, under the clause in the Constitution conferring upon it the power over foreign commerce, and commerce between the states, must depend ultimately upon the legislation of Congress; and the same clause, by necessary implication, fixes the line of jurisdiction in the states, as all power over the subject, outside of this grant, is left to the states—in other words, remains where it existed before the adoption of the Constitution—and comprehends jurisdiction over all their exclusively internal trade and commerce. *Poag v. The McDonald*, (1860) 17 Leg. Int. (Pa.) 318, 19 Fed. Cas.

Regulation of interstate navigation.—Congress is not limited to the regulation of navigation concerning interstate and foreign commerce, but has the power to regulate navigation upon navigable waters of the United States concerned exclusively with the domestic commerce of the states. The power of Congress to regulate navigation is not wholly derived from the power to regulate commerce, but may be derived from the double sources of the commercial power and the admiralty power; in some cases from one power, and in other cases from both; and the national legislature is competent under the admiralty power to declare what cases connected with navigation are of admiralty jurisdiction, and to create offenses within that jurisdiction. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 Fed. Rep. 339.

b. LIMITATION OF VESSEL OWNERS' LIABILITY.—The law of limited liability was enacted by Congress as a part of the maritime lien, and therefore it is coextensive, in its operation, with the whole territorial domain of that law.

Butler v. Boston Steamship Co., (1889) 130 U. S. 527. See also *In re Garnett*, (1891) 141 U. S. 12; *The Katie*, (1889) 40 Fed. Rep.

492; *The Garden City*, (1886) 26 Fed. Rep. 769. See the title *Limitation of Vessel Owner's Liability*, 4 FED. STAT. ANNOT. 837.

c. VESSELS ENROLLED UNDER ACTS OF CONGRESS.—The admiralty and maritime jurisdiction conferred by the Constitution upon the courts of the United States extends over vessels enrolled and licensed for the coast trade and over navigable waters.

Chisholm v. Northern Transp. Co., (1872) 61 Barb. (N. Y.) 388.

d. SYNOPSIS OF LAWS TO BE POSTED IN VESSELS.—An Act of Congress providing that the secretary of the treasury should cause to be prepared a

synopsis of the laws relating to the carriage of passengers and their safety in vessels propelled in whole or in part by steam, and give them to any such vessel, on application of its owner or master, who should, without unnecessary delay, have the same framed under glass and should place and keep them in conspicuous places in such vessel, and imposing a forfeiture in case such owner or master should neglect or refuse to comply with the provisions of the statute, was within the power of Congress to regulate commerce among the several states, and the constitutional provision extending the judicial power to all cases of admiralty and maritime jurisdiction.

The *Lewellen*, (1868) 4 Biss. (U. S.) 156, 15 Fed. Cas. No. 8,307. See section 4494, R. S., under title *Steam Vessels*, 7 Fed. Stat. Annot. 196.

7. Power of State to Legislate over Maritime Law — a. JURISDICTION CANNOT BE ENLARGED OR RESTRICTED. — The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure.

The *J. E. Rumbell*, (1893) 148 U. S. 12. See also *The Roanoke*, (1903) 189 U. S. 197.

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states." *The Lottawanna*, (1874) 21 Wall. (U. S.) 575.

The effect of a state statute cannot be to enlarge the jurisdiction of a court of admiralty, but only to furnish a remedy which did not exist before the statute was passed. The remedy within the contemplation of the state statute must be limited to such articles as are for the benefit of the ship, in aid of the voyage, and necessary in order to make the ship accomplish her undertaking. *The Mary F. Chisholm*, (1904) 129 Fed. Rep. 814. See also *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717; *The Coeurine*, (1858) 21 Law Rep. 343, 5 Fed. Cas. No. 2,944.

Matters of merely local concern. — The implied power of Congress to legislate over maritime law does not exclude state legislation upon matters of merely local concern, which can be much better cared for under state authority, and which have always been thus cared for; nor does it exclude general

legislation by the states, applicable alike on land and water, in their exercise of the police power for the preservation of life and health, though incidentally affecting marine affairs; provided that such legislation does not contravene any Acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations. The long-established doctrine in the Supreme Court has been that in this field of "border legislation," state laws are valid until Congress interposes and thereby excludes further state legislation. There is no reason why local state legislation should be deemed any more restricted by the implied power of Congress over maritime legislation than it is by express grant of the commercial power. *The City of Norwalk*, (1893) 55 Fed. Rep. 106, *affirmed* in *The Transfer No. 4*, (C. C. A. 1894) 61 Fed. Rep. 364.

There seem to be at least three classes of subjects, none of them affecting, however, what is peculiar to the general maritime law, or touching its international or interstate relations, in which state legislation is competent to affect the rights of parties in courts of admiralty, in the absence of legislation by Congress, viz.: (1) in the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature. *The City of Norwalk*, (1893) 55 Fed. Rep. 108, *affirmed* *The Transfer No. 4*, (C. C. A. 1894) 61 Fed. Rep. 364.

b. STATE STATUTE GIVING RIGHT OF ACTION FOR MARITIME TORT. — A state statute giving to the next of kin of a person crossing upon one of its public highways and killed by a common carrier an action for damages for the injury caused by the death of such person, does not interfere with the admiralty jurisdiction as conferred by this provision and Acts of Congress passed thereafter.

American Steamboat Co. v. Chase, (1872) 16 Wall. (U. S.) 530.

A state statute authorizing a recovery of pecuniary damages "in behalf of a widow, husband, children, or next of kin," for the

death of a person resulting from a maritime tort, may be administered by an admiralty court in the absence of legislation by Congress. *The City of Norwalk*, (1893) 55 Fed. Rep. 98, *affirmed* *The Transfer No. 4*, (C. C. A. 1894) 61 Fed. Rep. 364.

c. STATE LAW GIVING LIEN FOR USE OF WHARF. — A state statute making all domestic vessels subject to a lien for the use of a wharf does not make a lease of the wharf a maritime contract which can be enforced in a court of admiralty. By the term "use of a wharf" it is evident that nothing more was intended than "wharfage," which distinctly and obviously relates to the navigation, business, or commerce of the sea, and has always been regarded as among the usual and necessary port charges of a vessel. Wharfage is the use of a wharf furnished in the ordinary course of navigation. A contract relating to wharfage, as understood in the laws and usages of maritime affairs, is clearly a maritime contract. But there is a distinct difference between a claim for "wharfage" and a claim for "rent of a wharf."

The James T. Furber, (1904) 129 Fed. Rep. 808.

d. STATE LAW GIVING LIEN FOR NONPERFORMANCE OF CONTRACT OF CARRIAGE. — A state statute giving a lien for nonperformance of any contract for the carriage on a vessel of passengers or property, and providing that such liens shall be enforceable by suits *in rem*, was held to be enforceable in a suit in admiralty.

The Energia, (1903) 124 Fed. Rep. 842.

8. Liens for Repairs and Supplies — **a. REPAIRS OR SUPPLIES IN FOREIGN PORT.** — For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty.

The General Smith, (1819) 4 Wheat. (U. S.) 438; *The St. Jago de Cuba*, (1824) 9 Wheat. (U. S.) 409; *The Ship Virgin*, (1834) 8 Pet. (U. S.) 550; *Thomas v. Osborn*,

(1856) 19 How. (U. S.) 22; *The Grapeshot*, (1869) 9 Wall. (U. S.) 129; *The Lulu*, (1869) 10 Wall. (U. S.) 192; *The Kalarama*, (1869) 10 Wall. (U. S.) 204.

b. REPAIRS OR SUPPLIES IN HOME PORT. — For repairs or supplies in the home port of a vessel, no lien exists, nor can be enforced in admiralty under the general law, independently of local statute.

The Lottawanna, (1874) 21 Wall. (U. S.) 558; *The Edith*, (1876) 94 U. S. 518.

c. STATE STATUTE GIVING LIEN FOR REPAIRS AND SUPPLIES IN HOME PORT. — Whenever the statute of a state gives a lien, to be enforced by process *in rem* against a vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in

the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States.

The Robert W. Parsons, (1903) 191 U. S. 24; The Steamer St. Lawrence, (1861) 1 Black (U. S.) 522; The Lottawanna, (1874) 21 Wall. (U. S.) 558.

A lien upon a vessel, given by the local law, for repairs in her home port, can be enforced by suit *in rem* in admiralty. *Peyroux v. Howard*, (1833) 7 Pet. (U. S.) 324.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding *in rem* as practiced in an admiralty court. But a maritime lien does not arise on a contract to build a ship or in a contract to furnish materials for that purpose; and in respect to such contracts it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts. *Edwards v. Elhott*, (1874) 21 Wall. (U. S.) 557.

A New York statute which provided that whenever a debt amounting to fifty dollars or upwards shall be contracted by the master, owner, agent, or consignee of any ship or vessel within that state, for either of the following purposes: (1) on account of any work done or materials or articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel; (2) for such provisions and stores furnished within that state as may be fit and proper for the use of such vessel, at any time when the same were furnished; (3) on account of the wharfage, and the expenses of keeping such vessel in port, including the expenses incurred in employing vessels to watch her; and that such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all others thereon, except mariners' wages, was held to be constitutional, as applied to cases of repairs for domestic ships, that is, of ships belonging to the ports of that state. *The Barque Chusan*, (1843) 2 Story (U. S.) 455, 5 Fed. Cas. No. 2,717.

d. ENFORCEMENT OF LIENS FOR REPAIRS AND SUPPLIES — (1) *In General*.

— Where repairs have been made or necessities have been furnished to a foreign ship, or to a ship in the port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessities in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied unless it is recognized by that law.

The General Smith, (1819) 4 Wheat. (U. S.) 443. See also *Peyroux v. Howard*, (1833) 7 Pet. (U. S.) 340.

Such suits denied in England. — "Another class of cases in which jurisdiction has always been exercised by the admiralty courts in this country, but which is denied in England, are suits by ship carpenters and

materialmen, for repairs and necessities made and furnished to ships, whether foreign or in the port of a state to which they do not belong, or in the home port, if the municipal laws of the state give a lien for the work and materials." *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. (U. S.) 390.

A Contract for the Repair of a Canal Boat while lying in a canal wholly within the limits of a state and connecting navigable waters is a maritime contract.

The Robert W. Parsons, (1903) 191 U. S. 23, holding that a New York statute giving a lien for repairs upon vessels, and providing for the enforcement of such lien by proceed-

ings *in rem*, is invalid in so far as it would give the state courts jurisdiction *in rem* of such a case.

(2) *Exclusive Jurisdiction in Admiralty of Lien in Rem*. — A lien given by state statute for repairs or supplies to a vessel in her home port, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States.

Johnson v. Chicago, etc., Elevator Co., (1886) 119 U. S. 388; The Lottawanna, (1874) 21 Wall. (U. S.) 558; American Steamboat Co. v. Chase, (1872) 16 Wall. (U. S.) 530; The Belfast, (1868) 7 Wall. (U. S.) 624; The Moses Taylor, (1866) 4 Wall. (U. S.) 411; The Hine v. Trevor, (1866) 4 Wall. (U. S.) 555; Hursey v. Hassam, (1871) 45 Miss. 133.

A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States or by a local statute, is a *jus in re*, a right of the property in the vessel, and a maritime lien, to secure the performance of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the District Courts of the United States. When the lien is created by the general maritime law, for repairs or supplies in a foreign port, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of

the courts of the state. The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime, and equally within the maritime jurisdiction, and that jurisdiction is equally exclusive. The Glide, (1897) 167 U. S. 606.

Where state laws create liens upon the boat not strictly maritime and within the admiralty — such, for example, as a lien upon the boat for supplies in her home port — the federal admiralty will recognize and enforce them, and no state court can be clothed with power to enforce such liens by proceedings *in rem*. Thus, the state courts are not only impotent to enforce general maritime liens, but they are equally inadequate to the duty of enforcing, by proceedings *in rem*, liens created upon the vessel by the legislative power under which they sit to administer justice. U. S. v. Burlington, etc., Ferry Co., (1884) 21 Fed. Rep. 837.

(3) *Common-law Remedy of Attachment to Enforce Lien.* — Liens under state statute, enforceable in attachment in suits *in personam*, may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*. There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy, which a court of common law is competent to give.

Johnson v. Chicago, etc., Elevator Co., (1886) 119 U. S. 399.

"The distinction is sharply drawn between a common-law action *in personam* with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or 'offending thing,' which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court, rule second declaring that in suits *in personam* the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for;' and rule nine, that in suits and proceedings *in rem* the process shall be by warrant of arrest of the ship, goods, or other

things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts." The Robert W. Parsons, (1903) 191 U. S. 37.

A maritime lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of the Supreme Court of the United States, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations, prescribing the mode of their enforcement. Hursey v. Hassam, (1871) 45 Miss. 133.

(4) *No Admiralty Jurisdiction to Enforce Liens for Constructing Vessels.* — Admiralty jurisdiction does not extend to the enforcement of liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

People's Ferry Co. v. Beers, (1857) 20 How. (U. S.) 402, wherein the court said: "It would be a strange doctrine to hold the ship bound in a case where the owner made the contract in writing, charging himself to

pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to

navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land. The wages of the shipwrights had no reference to a voyage to be performed; they had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built; they were bound to rely on their contract. It was thus held by the first Judge Hopkinson, in 1781, who then declared, as respects shipbuilders, that 'the practice of former times doth not justify the admiralty's taking cognizance of their suits.' (*Chilton v. The Brig Hannah*, [1781] *Bee Adm.* 419.) And we feel warranted in saying that at no time since this has been an independent nation has such a practice been allowed. (*Turnbull v. The Ship Enterprize*, [1785] *Bee Adm.* 345.) It is proper, however, to notice the fact that District Courts

have recognized the existence of admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the state where the vessel was built; such as *Read v. Hull of a New Brig*, (1840) 1 *Story* (U. S.) 244; and *Davis v. A New Brig*, (1834) *Gilp.* (U. S.) 473; *Harper v. The New Brig*, (1835) *Gilp.* (U. S.) 536; *Ludington v. The Nucleus*, (1850) 2 *Am. L. J. N. S.* 563, 15 *Fed. Cas. No.* 8,598. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court."

Contracts for the building of a ship are not maritime in their character, and states may not only grant liens, but may provide remedies for their enforcement. *The Robert W. Parsons*, (1903) 191 U. S. 25.

9. Transportation—*a.* BETWEEN TWO OR MORE STATES.—Maritime jurisdiction extends over all navigable waters where the commerce is between two or more states.

Raymond v. The Schooner Ellen Stewart, (1850) 5 *McLean* (U. S.) 269, 20 *Fed. Cas. No.* 11,594.

***b.* BETWEEN PORTS OF THE SAME STATE.**—The grant of admiralty jurisdiction cannot be made to depend upon the power of Congress to regulate commerce, and includes maritime causes arising from transportation on navigable waters between ports and places of the same state.

The Belfast, (1868) 7 *Wall.* (U. S.) 624, in effect overruling *Allen v. Newberry*, (1858) 21 *How.* (U. S.) 244, and *Maguire v. Card*, (1858) 21 *How.* (U. S.) 248, wherein it was held, respectively, that an admiralty court had not jurisdiction of a suit upon a contract of shipment of goods between ports and places of the same state, nor of a suit on a contract for supplies furnished to a vessel engaged in such trade.

See also *Western Transp. Co. v. The Schooner Great Western*, (1863) 4 *West. L. Month.* 261, 29 *Fed. Cas. No.* 17, 448.

Navigability being the test of admiralty jurisdiction, the admiralty jurisdiction extends to all vessels navigating the waters of the United States, as contradistinguished from the waters of the states, whatever may be the character of the commerce in which they are engaged, whether foreign, interstate, or completely internal to the states. If the federal admiralty jurisdiction does not extend over the navigable waters of the United States to all cases of contract and tort growing out of the kind of commerce and naviga-

tion indicated, the suitor must be remitted for redress to the common-law jurisdiction of the local courts; for there is and can be no admiralty jurisdiction whatever, other than that of the United States, applicable to such cases. *U. S. v. Burlington, etc., Ferry Co.*, (1884) 21 *Fed. Rep.* 335.

In cases of contracts or torts.—The admiralty and maritime jurisdiction does not extend to contracts entered into with, or torts committed by the master and crew of, a vessel engaged in the business of navigation and trade in the purely internal commerce of a state upon the waters between ports and places of the same state. Such jurisdiction is derived from and dependent upon the power of Congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, and cannot be exercised with respect to purely internal navigation and trade or transportation carried on within the territorial limits of a particular state, whatever may be the cause of action or form of remedy. *Poag v. The McDonald*, (1859) 19 *Fed. Cas. No.* 11,238, *affirmed* (1860) 17 *Leg. Int.* (Pa.) 318, 19 *Fed. Cas. No.* 11,239.

10. Collision Within Body of a County.—There is jurisdiction in the admiralty of a collision within the body of a county or above the tide water.

Jackson v. The Steamboat Magnolia, (1857) 20 *How.* (U. S.) 299.

11. Ferry Boats Flying Between States.—Ferry boats used in carrying on both traffic and intercourse between states are within the legitimate range of

congressional legislation under the constitutional grant of power to regulate commerce among the several states, and therefore within the scope of the admiralty jurisdiction of the national courts.

The Steamboat Cheeseman v. Two Ferry-boats, (1870) 2 Bond (U. S.) 363, 5 Fed. Cas. No. 2,633.

12. Rights of Mortgagee and Owner of Vessel. — There is no jurisdiction in admiralty in questions of property between a mortgagee and the owner of a vessel. A court of admiralty has not jurisdiction to decree the sale of a ship for an unpaid mortgage, nor can it declare a ship to be the property of the mortgagees and direct the possession of her to be given to them.

Bogart v. The Steamboat John Jay, (1854) 17 How. (U. S.) 400.

13. State Oyster Laws. — A state statute passed to protect the growth of oysters in the waters of the state by prohibiting the use of particular instruments in dredging, and declaring a forfeiture to the state of the boat or vessel employed for the purpose, is not repugnant to the provision which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

Smith v. Maryland, (1855) 18 How. (U. S.) 73.

A New Jersey statute under which a vessel found engaged in taking oysters in a river cove, by means of dredges, was seized, condemned, and sold, does not violate that part of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. "If, then, it could be admitted that Congress might legislate upon the subject of fisheries within the limits of the several states, upon the ground of the admiralty and maritime jurisdiction, it would seem to be a conclusive answer to the whole of the argument on this point, that no such legislation has taken place; and consequently the power of the state governments to pass laws to regulate the fisheries within their respective limits remains as it stood before the Constitution was adopted." *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230. See also *Bennett v. Boggs*, (1830) Baldw. (U.

S.) 60, 3 Fed. Cas. No. 1,319, as to a New Jersey statute regulating fisheries.

A Virginia statute authorizing the arrest and confiscation of vessels for violations of oyster laws is invalid in divesting the rights of maritime creditors by a local court by a proceeding unknown to the maritime law. A maritime lien cannot be divested by any proceeding in a civil action in a common-law court; such court cannot exercise jurisdiction over the lien either directly or indirectly; and a state cannot under the Constitution confer jurisdiction to divest this lien, the lien attaching at the moment of the contract or tort in which it originates, and traveling with the ship wherever it may go, into whose-soever possession it may come, by whatever right or accident. Nor can it be adjudicated in the United States by any court than those upon which, by the Constitution and laws of the United States, the exclusive jurisdiction over it is conferred. *The Ellexena*, (1892) 53 Fed. Rep. 364.

14. Supplemental Suits to Determine Ownership of Proceeds. — It is an inherent incident to the jurisdiction of an admiralty court to entertain supplemental suits by the parties in interest to ascertain to whom proceeds rightfully in the possession and custody of the court rightfully belong and to deliver them over to the parties who establish the lawful ownership thereof.

Andrews v. Wall, (1854) 3 How. (U. S.) 573.

15. Dispute Between Part Owners. — The jurisdiction of courts of admiralty in cases of part owners having unequal interests and shares is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called.

The Steam-Boat Orleans v. Phœbus, (1837) 11 Pet. (U. S.) 182.

16. Pilotage.—Suits for pilotage are within the admiralty and maritime jurisdiction of the United States. The service is strictly maritime. The jurisdiction of the District Courts of the United States in cases of admiralty and maritime jurisdiction is not ousted by the adoption of the state laws by an Act of Congress. The only effect is to leave the jurisdiction concurrent in the state courts; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum to which he would be entitled under the state laws adopted by Congress, if he should sue in the state courts.

Hobart v. Drozan, (1836) 10 Pet. (U. S.) 118.

Congress, under the power to regulate commerce, might doubtless establish by law a system of pilotage in ports and harbors within the territorial limits of the states, and give to the District Courts jurisdiction of all cases arising under such law. But the cession by the states of all cases of admiralty and maritime jurisdiction cannot be construed into a cession of the waters on which those cases may arise. The jurisdiction of the state, and its right to legislate, is coextensive with its territory, and is still

retained, except so far as it has been ceded to the United States. *The Schooner Wave v. Hyer*, 2 Paine (U. S.) 131, 20 Fed. Cas. No. 17,300.

Such suits denied in England.—“Another class of cases in which jurisdiction is entertained by the [admiralty] courts in this country on contracts, but which is denied in England, are suits for pilotage. It is denied in England on the ground of locality, the contract having been made within the body of a county.” *New Jersey Steam Nav. Co. v. Merchants' Bank*, (1848) 6 How. (U. S.) 391.

VIII. “TO WHICH THE UNITED STATES SHALL BE A PARTY.”—It cannot be assumed that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the states, and that the permanency of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law.

U. S. v. Texas, (1892) 143 U. S. 644.

IX. “BETWEEN TWO OR MORE STATES.”—In order to maintain jurisdiction of a suit between two states it must appear that the controversy to be determined is a controversy arising directly between them, and not a controversy in vindication of the grievances of particular individuals.

Louisiana v. Texas, (1900) 176 U. S. 16, wherein the court said: “The reference we have made to the derivation of the words ‘controversies between two or more states’ manifestly indicates that the framers of the Constitution intended that they should include something more than controversies over ‘territory or jurisdiction;’ for in the original draft as reported the latter controversies were to be disposed of by the Senate, and controversies other than those by the judiciary, to which by amendment all were finally committed. But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity

was absolute and the matter in itself properly justiciable;” and that in order that a controversy between states, justiciable in the Supreme Court of the United States, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. “When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state.”

X. “BETWEEN A STATE AND CITIZENS OF ANOTHER STATE” — 1. **Object of Clause.**—The object of vesting in the courts of the United States jurisdiction of suits

by one state against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff state were compelled to resort to the courts of the state of which the defendants were citizens.

Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 289.

2. Involving Determination of Political Questions.—Jurisdiction over controversies “between a state and citizens of another state” does not embrace the determination of political questions, and where no controversy exists between states, the United States Supreme Court cannot restrain the governor of a state in the discharge of his executive functions in a matter lawfully confided to his discretion and judgment.

Louisiana v. Texas, (1900) 176 U. S. 23.

The grant is of “judicial power,” and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that

it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all. *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 289.

3. Suit Against the State in Assumpsit.—A state is amenable to the jurisdiction of the Supreme Court of the United States at the suit of a citizen of another state, in assumpsit.

Chisholm v. Georgia, (1793) 2 Dall. (U. S.) 419.

4. Modified by the Eleventh Amendment.—The Eleventh Amendment was passed as a result of the decision of *Chisholm v. Georgia*, (1793) 2 Dall. (U. S.) 419.

New Hampshire v. Louisiana, (1883) 108 U. S. 86.

As modified by the eleventh amendment this clause prescribes the limits of the judicial power of the court of the United States. *U. S. v. Louisiana*, (1887) 123 U. S. 35.

As modified by the Eleventh Amendment, this section states all the cases and controversies in which the judicial power of the United States can be exercised, except those arising on a petition for a writ of habeas corpus, which is regarded as a suit for one's personal freedom. *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 255.

If a State Statute Gives a Right to Bring Suit Against the State, in the state courts, a federal court may entertain such a suit when grounds of federal jurisdiction exist.

Reinhart v. McDonald, (1896) 76 Fed. Rep. 403.

XI. “BETWEEN CITIZENS OF DIFFERENT STATES” — 1. Object of Clause.—The clause in the Constitution extending the judicial power to controversies “between citizens of different states” was intended to secure the citizen against local prejudice, which might injure him if compelled to litigate his controversy with another in the tribunals of a state not his own. The object was the avowed purpose of the constitutional provision at the time of its adoption.

Whelan v. New York, etc., R. Co., (1888) 35 Fed. Rep. 858. See also the Act of March 3, 1875, section 1, as amended, under the title *Judiciary*, 4 FED. STAT. ANNOT. 289.

2. No Limitation on the Class of Cases.—The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different

states, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary.

Gaines v. Fuentes, (1875, 92 U. S. 18, wherein the court said: "The Constitution declares that the judicial power of the United States shall extend 'to controversies between citizens of different states,' as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all state authority. Such are cases in which the United States are parties, — cases of admiralty and maritime jurisdiction, and cases for the enforcement of rights

of inventors and authors under the laws of Congress. *The Moses Taylor*, (1866) 4 Wall. (U. S.) 429; *Chicago, etc., R. Co. v. Whitton*, (1871) 13 Wall. (U. S.) 288. But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different states, it rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions — whether originally in the federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings — whether before issue or trial by removal to a federal court, or after judgment upon appeal or writ of error." *Reversing Fuentes v. Gaines*, (1873) 25 La. Ann. 85.

3. Distinguishing States and Citizens. — This clause indicates that a state is a different thing from a citizen of a state; and that when the words "citizens of different states" are used, it was not intended to include in that class suits in which a state is a party. Controversies between two or more states are mentioned; controversies between a state and citizens of another state are mentioned; also, controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Alabama v. Wolfe, (1883) 18 Fed. Rep. 838. See also *infra*, p. 106, *A state as a citizen*.

4. Following Decisions of State Courts. — Comity or respect for the state courts does not require the Supreme Court of the United States to surrender its judgment to decisions made in the state and declare contracts to be void which upon full consideration have been pronounced to be valid. Undoubtedly that court will always feel itself bound to respect the decisions of the state courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own constitution and laws, but it cannot give to them a retroactive effect and allow them to render invalid contracts entered into with citizens of other states which in the judgment of that court were lawfully made. For if such rule were adopted, and the comity due to state decisions pushed to that extent, the provision in the Constitution which secures to the citizens of another state the right to sue in the courts of the United States might become utterly useless and nugatory.

Rowan v. Runnels, (1847) 5 How. (U. S.) 139.

5. Action to Annul a Will. — The judicial power of the United States extends, by the terms of the Constitution, "to controversies between citizens of different states;" and on the supposition, which is not admitted, that this embraces only such as arise in cases "in law and equity," it does not necessarily exclude those which may involve the exercise of jurisdiction in reference to the proof of

validity of wills. The original probate, of course, is mere matter of state regulation, and depends entirely upon the local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which alone they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.

Ellis v. Davis, (1883) 109 U. S. 496. See also *Gaines v. Fuentes*, (1875) 92 U. S. 17, *reversing* (1873) 25 La. Ann. 85.

6. Suit on Bond Taken in Name of Governor. — A suit on an officer's bond may be brought by citizens of another state though the bonds were taken in the name of the governor of the state, and the suit must be brought in the name of the governor for the use of the real plaintiff. As the instrument of the state law to afford a remedy against the sheriff and his sureties, the governor's name is in the bond and to a suit upon it, but in no just view of the Constitution or law can he be considered as a litigant party.

McNutt v. Bland, (1844) 2 How. (U. S.) 14.

7. Relation to Legislative Grant of Jurisdiction. — The words in the legislative grant of jurisdiction, "of the state where the suit is brought and a citizen of another state," are obviously no more than equivalent terms to confine suits in the Circuit Courts to those which are "between citizens of different states." The words in the Constitution then are just as operative to ascertain and limit jurisdiction as the words in the statute. It is true, that under these words "between citizens of different states," Congress may give the courts jurisdiction between citizens in many other forms than that in which it has been conferred. But in the way it is given, the object of the legislature seems exclusively to have been to confer jurisdiction upon the court, strictly in conformity to the limitation as it is expressed in the Constitution, "between citizens of different states."

Louisville, etc., R. Co. v. Letson, (1844) 2 How. (U. S.) 553.

XII. "CLAIMING LANDS UNDER GRANTS OF DIFFERENT STATES." — The jurisdiction of the Circuit Court of the United States was held to extend to a case between citizens of Kentucky claiming lands exceeding the value of five hundred dollars under different grants, the one issued by the state of Kentucky and the other by the state of Virginia, but upon warrants issued by Virginia and locations founded thereon prior to the separation of Kentucky from Virginia. It was the grant which passed the legal title to the land, and if the

controversy was founded upon the conflicting grants of different states the judicial power of the courts of the United States extended to the case, whatever might have been the equitable title of the parties prior to the grant.

Colson v. Lewis, (1817) 2 Wheat. (U. S.) 377.

XIII. "BETWEEN A STATE, OR THE CITIZENS THEREOF, AND FOREIGN STATES, CITIZENS OR SUBJECTS" — 1. Whatever the Subject of Controversy. — If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 378.

2. Indian Tribe Not a Foreign State. — An Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States.

Cherokee Nation v. Georgia, (1831) 5 Pet. (U. S.) 16, wherein the court said: "Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly perhaps, be denominated do-

mestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian."

See also Act of March 3, 1875, section 1, as amended, under title *Judiciary*, 4 FED. STAT. ANNOT. 298.

3. Suits Between Aliens. — The judicial power was not extended by the Constitution to private suits in which an alien is a party unless a citizen be the adverse party.

Jackson v. Twentyman, (1829) 2 Pet. (U. S.) 136.

See also Act of March 3, 1875, section 1, as amended, under title *Judiciary*, 4 FED. STAT. ANNOT. 298.

The courts of the United States have no jurisdiction of cases between aliens. *Monta-*

let v. Murray, (1807) 4 Cranch (U. S.) 46. See also *Bailiff v. Tipping*, (1804) 2 Cranch (U. S.) 406. But see *Mason v. Ship Blaireau*, (1804) 2 Cranch (U. S.) 263, wherein Marshall, C. J., said: "Whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it."

XIV. DISTRICT OF COLUMBIA AND TERRITORIES AS STATES. — The District of Columbia and the territories are not states, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states.

Downes v. Bidwell, (1901) 182 U. S. 270, wherein the court said: "The judicial clause of the Constitution has no application to courts created in the territories, and with respect to them Congress has a power wholly unrestricted by it."

The District of Columbia is not a state within the meaning of the Constitution. *Hoe v. Jamieson*, (1897) 166 U. S. 397.

A resident of the District of Columbia cannot maintain an action in the Circuit Court for the district of Virginia against a citizen of Virginia. The clauses relating to the election of representatives and senators and to the appointment of presidential electors show

that the word "state" is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it. *Hepburn v. Ellzey*, (1804) 2 Cranch (U. S.) 452.

A citizen of a territory cannot sue a citizen of a state in the courts of the United States, nor can those courts take jurisdiction

by other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed. *New Orleans v. Winter*, (1816) 1 Wheat. (U. S.) 91.

An Act of Congress providing that courts of a particular territory "shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," does not give to such courts admiralty and maritime jurisdiction. By declaring that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be

made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction," the Constitution contemplates three distinct classes of cases, and the granting jurisdiction over one of them does not confer jurisdiction over either of the other two. *American Ins. Co. v. 356 Bales Cotton*, (1828) 1 Pet. (U. S.) 544.

The Constitution does not restrain Congress from giving to a United States court for a territorial district jurisdiction over a case brought by or against a citizen of the territory. *Sere v. Pitot*, (1810) 6 Cranch (U. S.) 337.

XV. A STATE AS A CITIZEN.—A state is not a citizen within the meaning of the Constitution.

Minnesota v. Northern Securities Co., (1904) 194 U. S. 63. See also *Postal Tel. Cable Co. v. Alabama*, (1894) 155 U. S. 487;

and *supra*, p. 103, *Between citizens of different states—Distinguishing states and citizens.*

XVI. A CORPORATION AS A CITIZEN.—A corporation is a citizen in such a sense that diversity of citizenship will give the United States courts jurisdiction of the suit or controversy.

Marshall v. Baltimore, etc., R. Co., (1853) 16 How. (U. S.) 325; *Chicago, etc., R. Co. v. Whitton*, (1871) 13 Wall. (U. S.) 283; *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 287.

Though it may have members out of the state.—A corporation created by a state to perform its functions under the authority of that state, and only suable there, though it may have members out of the state, is a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state. *Louisville, etc., R. Co. v. Letson*, (1844) 2 How. (U. S.) 555.

Railroad, operating line through several

states.—While a railroad company owning and operating a line running through several states may receive and exercise powers granted by each, and may, for many purposes, be regarded as a corporation of each, such legislation does not avail to make the same corporation a citizen of every state it passes through within the meaning of the jurisdiction clause of the Constitution. *St. Joseph, etc., R. Co. v. Steele*, (1897) 167 U. S. 663.

A county, as a municipal corporation, is a citizen within the meaning of the Constitution and Acts of Congress, and therefore suable in the United States courts. *McCoy v. Washington County*, (1862) 3 Wall Jr. (C. C.) 381, 15 Fed. Cas. No. 8,731.

The Words "Citizens" and "Aliens" include corporations.

Barrow Steamship Co. v. Kane, (1898) 170 U. S. 106, wherein the court said: "The jurisdiction of the Circuit Courts over suits between a citizen of one state and a corporation of another state was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the state by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. *U. S. Bank v. Deveaux*, (1809) 5 Cranch (U. S.) 61, 87, 88; *Hope Ins. Co. v. Boardman*, (1809) 5 Cranch (U. S.) 57; *Commercial, etc., Bank v. Slocomb*, (1840) 14 Pet. (U. S.) 60. But the earlier cases were afterwards overruled:

and it has become the settled law of this court that, for the purposes of suing and being sued in the courts of the United States, a corporation created and doing business in a state is, although an artificial person, to be considered as a citizen of the state, as much as a natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same state with the corporation. *Louisville, etc., R. Co. v. Letson*, (1844) 2 How. (U. S.) 497, 558; *Marshall v. Baltimore, etc., R. Co.*, (1853) 16 How. (U. S.) 314, 329; *Muller v. Dows*, (1876) 94 U. S. 444; *National Steamship Co. v. Tugman*, (1882) 106 U. S. 118; *St. Louis, etc., R. Co. v. James*, (1896) 161 U. S. 545, 555, 559."

XVII. RESIDENCE AND CITIZENSHIP.—Residence and citizenship are wholly different things within the meaning of the Constitution and the laws defining

and regulating the jurisdiction of the Circuit Courts of the United States; and a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction.

Steigleder v. McQuesten, (1906) 198 U. S. 143.

XVIII. LIMITATION OF AMOUNT IN CONTROVERSY.—In this section is not found any limitation by way of amount in controversy. When Congress therefore provides by statute for the exercise by the Circuit Courts of jurisdiction over controversies coming within the constitutional grant of power, such jurisdiction will exist as to all such controversies, regardless of the amount involved therein, unless the Act providing for the exercise of the jurisdiction provides a limitation as to the sum in controversy.

McDermott v. Chicago, etc., R. Co., (1889) 38 Fed. Rep. 529.

See Act of March 3, 1875, section 1, as amended, under title *Judiciary*, 4 FED. STAT. ANNOT. 272.

XIX. MANDAMUS.—Congress has undoubtedly power to authorize a Circuit Court to issue a mandamus in an original proceeding.

Knapp v. Lake Shore, etc., R. Co., (1906) 197 U. S. 542. See *Brown's Case*, (1870) 6 Ct. Cl. 188. See also *supra*, *Control of executive officers by mandamus or injunction*, p. 72.

"The authority to issue the writ of mandamus to an officer of the United States, commanding him to perform a specific act required by a law of the United States, is within the scope of the judicial powers of the United States, under the Constitution. But the whole of that power has not been communicated by law to the Circuit Courts; or in other words, it was then a dormant power not yet called into action, and vested in those courts; and there is nothing growing out of the official character of the party

that will exempt him from this writ, if the act to be performed is purely ministerial." *Kendall v. U. S.*, (1838) 12 Pet. (U. S.) 618.

When necessary to exercise of jurisdiction.—The power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *M'Intire v. Wood*, (1813) 7 Cranch (U. S.) 504.

To withdraw money from the treasury.—A Circuit Court of the United States has not the power to issue a writ commanding the secretary of the treasury to pay a territorial judge his salary for the unexpired term of his office, from which he had been removed. *U. S. v. Guthrie*, (1854) 17 How. (U. S.) 284.

XX. COMMON-LAW JURISDICTION—1. **In General.**—There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes.

Smith v. Alabama, (1888) 124 U. S. 478, citing *Wheaton v. Peters*, (1834) 8 Pet. (U. S.) 591, and saying: "A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York Cent. R. Co. v. Lockwood*, (1873) 17 Wall. (U. S.) 357, where the common law

prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state. In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts than in other cases. *Swift v. Tyson*, (1842) 16 Pet. (U. S.) 1; *Carpenter v. Providence Washington Ins. Co.*, (1842) 16 Pet. (U. S.) 495; *Oates v. National Bank*, (1879) 100 U. S. 239; *Brooklyn City, etc., R. Co. v. National Bank*, (1880) 102 U. S. 14. There is, however, one clear exception to the statement that there is no national common law.

The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." See *Application of Principles of Common Law*, 8 FED. STAT. ANNOT. 374.

The courts of the Union, if the plaintiff is a citizen of a state other than that in which he brings suit, have jurisdiction and are competent to administer civil remedies for injuries received from obstructions to navigable waters, upon the principles of the common law without any statutory enactment for that purpose. *Jolly v. Terre Haute Draw-Bridge Co.*, (1853) 6 McLean (U. S.) 237, 13 Fed. Cas. No. 7,441.

The grant of jurisdiction of all cases in law or equity arising under the Constitution, laws, and treaties of the United States, does not recognize the common law as a system to be administered by the national courts, but the rights given upon which cases at law and in equity are based are to be found by a resort to the Constitution and laws of the United States, and its treaties. Any rule of the

common law affecting interstate shipments, to be effectual as to such shipments, must have had the legislative sanction of the Congress of the United States. *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 124.

"Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex p. Bollman*, (1807) 4 Cranch (U. S.) 93.

Function of *parens patriæ* in relation to minors. — There is not vested in the United States government a common-law prerogative; a Circuit Court cannot, upon the footing of common-law prerogative, by writ of habeas corpus, assume to exercise the function of *parens patriæ* in relation to infant children held in detention by private individuals not acting under color of authority from the laws of the United States. *In re Barry*, (1844) 42 Fed. Rep. 125, *writ of error dismissed* in *Barry v. Mercein*, (1847) 5 How. (U. S.) 103, on the ground that such a controversy related to a matter which is incapable of being reduced to any pecuniary standard of value, and the court, under the Act of Congress, had no appellate jurisdiction. But see *U. S. v. Green*, (1824) 3 Mason (U. S.) 482, 26 Fed. Cas. No. 15,256, in which Story, J., took jurisdiction of such a case,

2. No Common-law Offenses. — There are no common-law offenses against the United States.

U. S. v. Eaton, (1892) 144 U. S. 687; *Benson v. McMahon*, (1888) 127 U. S. 466; *U. S. v. Britton*, (1883) 108 U. S. 206; *U. S. v. Worrall*, (1798) 2 Dall. (U. S.) 384; Jurisdiction of Federal Judiciary, (1848) 5 Op. Atty-Gen. 55. See *infra*, *From state to federal courts — Power to remove state criminal cases*, p. 116.

Common law in criminal cases cannot be exercised by the federal courts. "To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt

possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers." *U. S. v. Hudson*, (1812) 7 Cranch (U. S.) 32. See also *U. S. v. Coolidge*, (1816) 1 Wheat. (U. S.) 415.

Excepting that treason is defined by the Constitution, there are no crimes against the United States save such as Congress has expressly defined or recognized and made punishable. The federal courts have no jurisdiction over common-law crimes. *U. S. v. Dietrich*, (1904) 126 Fed. Rep. 678.

XXI. JURISDICTION OF STATE COURTS — 1. When Concurrent with Federal Courts. — The judicial power of the United States extends by the Constitution to controversies between citizens of different states as well as to cases arising under the Constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all state authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the states.

Chicago, etc., *R. Co. v. Whitton*, (1871) 13 Wall. (U. S.) 288. But see *Davison v. Champlin*, (1828) 7 Conn. 248; *State v. M'Bride*, (1839) 1 Rice L. (S. Car.) 419.

Suits by states against citizens of other states.—As, under the long-settled interpretation of the Constitution, the mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not, of itself, divest the state courts of jurisdiction to hear and determine such cases, the courts of a state may, so far as the Constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against citizens of other states when Congress has not invested the national courts with exclusive jurisdiction in cases of that kind; subject, of course, to the right of the defendant to have such suit removed to the proper Circuit Court of the United States, whenever the removal thereof is authorized by the Acts of Congress; and subject, also, to the authority of the Supreme Court to review the final judgment of the state court, if the case be one within its appellate jurisdiction.

Plaquemines Tropical Fruit Co. v. Henderson, (1898) 170 U. S. 521.

A state court was held to have jurisdiction in trover to recover mail matter wrongfully withheld for a charge of unlawful postage. The court quoted with approval the language of the state court from which the case was brought by writ of error, that "this is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary." *Teal v. Felton*, (1851) 12 How. (U. S.) 292.

The jurisdiction of the state courts extends to an indictment for forging the names of soldiers to powers of attorney authorizing the defendant to demand and receive their warrants for the donation of lands granted by Acts of Congress, for services during the revolutionary war. *Com. v. Schaffer*, (1797) 4 Dall. (Pa.) appendix xxvi.

2. When Congress May Authorize State Courts to Act.—Congress is at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers of courts not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States, to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself.

Robertson v. Baldwin, (1897) 165 U. S. 278, wherein the court said: "The first proposition, that Congress has no authority under the Constitution to vest judicial power in the courts or judicial officers of the several states, originated in an observation of Mr. Justice Story in *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 304, 330, to the effect that 'Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself.' This was repeated in *Houston v. Moore*, (1820) 5 Wheat. (U. S.) 1, 27; and the same general doctrine has received the approval of the courts of several of the states. * * * The better opinion is that the second section was intended as a constitutional definition of the judicial power, *Chisholm v. Georgia*, (1793) 2 Dall. (U. S.) 419, 475, which the Constitution intended to confine to courts created by Congress; in other words, that such power extends only to the trial and determination of cases in courts of record;" and held that the power of justices of the peace to arrest deserting seamen and deliver them on board their vessel is not within the definition of the "judicial power" as defined in the Constitution, and may be lawfully conferred on state officers, and Acts of Congress conferring such jurisdiction are not unconstitutional. See also *Levin v. U. S.*, (C. C. A. 1904) 128 Fed. Rep. 829; *Ex p. Gist*, (1855) 26 Ala. 156.

See *Houston v. Moore*, (1820) 5 Wheat. (U. S.) 27.

Power may be conferred upon a state officer, as such, to execute a duty imposed under an Act of Congress, and the officer may execute the same, unless its execution is prohibited by the Constitution or legislation of the state. *Dallemagne v. Moisan*, (1905) 197 U. S. 174.

Congress has no right to require that state courts shall entertain suits for the objects and purposes declared in a bankrupt law. The states, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions and jurisdiction according to their own mere pleasure. They may refuse to allow suits to be brought there "arising under the laws of the United States," for many just reasons; first, that Congress are bound to provide such tribunals for themselves; secondly, that state courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own courts and the rights of their own citizens, and be attended with great expense to the state, as well as great delays in the administration of justice, to allow their courts to be crowded with suits arising under the laws of the United States;

and fourthly, as in the present case, that it would involve the state courts in almost endless examinations and discussions of the principles and bearings of the bankrupt law, confessedly a system novel in our jurispru-

dence, intricate in its details, and involving questions exceedingly complicated and difficult in its practical operation. *Mitchell v. Great Works Milling, etc., Co.*, (1843) 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.

3. Congress May Exclude State Jurisdiction. — It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.

Plaquemines Tropical Fruit Co. v. Henderson, (1898) 170 U. S. 517. See also *Ex p. Houghton*, (1881) 8 Fed. Rep. 897.

"In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, 'and that the judicial power shall extend to all cases;' but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate. The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the Constitution, and it

could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations; and as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offenses, in which the principles of the law and comity of nations often form an essential inquiry. All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever. A different policy might well be adopted in reference to the second class of cases; for although it might be fit that the judicial power should extend to all controversies to which the United States should be a party, yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It might not have been deemed proper to submit the sovereignty of the United States, against their own will, to judicial cognizance, either to enforce rights or to prevent wrongs; and as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might, in their wisdom, choose to apply. * * * We do not, however, profess to place any implicit reliance upon the distinction which has here been

stated and endeavored to be illustrated." *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 333, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1.

"How far this judicial power is exclusive, or may, by the legislation of Congress, be made exclusive in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 334, Mr. Justice Story comments upon the fact that there are two classes of cases enumerated in the clause cited, between which a distinction is drawn; that the first class includes cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors, other public ministers, and consuls, and cases of admiralty and maritime jurisdiction; and that, with reference to this class, the expression is that the judicial power shall extend to all cases; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word 'all' is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that, with respect to the first class, it may have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases, and, with respect to the latter class, to leave it to Congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons and various considerations of public policy are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts, — a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably

exclusive of all state authority, and that in all others it may be made so at the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The Judiciary Act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offenses, are placed, from their commencement, exclusively under the cognizance of the federal courts. On the other hand, some cases, in which an alien or a citizen of another state is made a party, may be brought either in a federal or a state court, at the option of the plaintiff; and if brought in the state court may be prosecuted until the appearance of the defendant, and then, at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts. Other cases, not included under these heads, but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases, which by the Judiciary Act could only come under the cognizance of the federal courts after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both state and federal courts." *The Moses Taylor*, (1866) 4 Wall. (U. S.) 428.

XXII. REMOVAL OF CAUSES — 1. From One Circuit to Another. — Congress may authorize the removal of suits from one circuit to another. There are no words in the Constitution to prohibit or restrain the exercise of this power.

Stuart v. Laird, (1803) 1 Cranch (U. S.) 299.

2. From State to Federal Courts. — An Act of Congress providing for the removal of suits from state courts to the United States Circuit Courts, when the Circuit Courts could be given by Congress original or appellate jurisdiction of such suits, is constitutional.

Nashville v. Cooper, (1867) 6 Wall. (U. S.) 247. But see *Moseley v. Chamberlain*, 18 Wis. 704.

See Act of March 3, 1875, section 2, as amended, under title *Judiciary*, 4 FED. STAT. ANNOT. 312.

Between citizens of the same state. — The federal courts cannot be authorized to divest a state court of its jurisdiction, once regularly acquired, of a suit between citizens of the same state, unless it involves title to lands claimed to have been acquired by different states, or affects ambassadors, minis-

ters, or consuls, or is a case arising under the Constitution or a law of the United States. Any statute professing to authorize such a transfer of such suit would be an encroachment upon the reserved rights of the state, in conflict with the National Constitution, and void. An Act of Congress which would require the removal of a suit from a state court after the plaintiff had become a citizen of the same state as the defendant, would be void. *Bruce v. Gibson*, (1881) 9 Fed. Rep. 540.

Between citizens of different states.—Congress has the power to provide for the removal of a case from a state to a national court in which some of the necessary parties defendant are citizens of the same state with the parties plaintiff or some of them. "The change in the language of this section from the use of the term 'cases' to 'controversies' is apparently deliberate and premeditated; and, in the case of an instrument so carefully prepared and considered as the Constitution of the United States, cannot be regarded as fortuitous, or without special significance. In my judgment, it was intended by the use of the terms 'cases' and 'controversies' to distinguish between an ordinary action or suit, which may include many parties plaintiff or defendant, and involve the examination and consideration of more than one item of dispute or controversy, and so much or such part of such proceeding as may only constitute a controversy between two or more of said parties, who are citizens of different states. There may be a controversy in a case which is less than the whole of it. Both the Act of 1875 and that of 1887 (section 2) make express provision for the removal of a case—the whole case—in which there is a separate controversy between citizens of different states. A controversy between citizens of different states is none the less such a controversy because they are not the only parties to it." *Fisk v. Henarie*, (1887) 32 Fed. Rep. 422, *reversed* on the question of construction of the removal statute, (1892) 142 U. S. 459.

The jurisdiction conferred by the Constitution extends to controversies between citizens of different states and is broader than an Act giving the right of removal of a suit from a state court into a United States court, which is limited to a controversy in which one of the parties is a citizen of the state in which suit is brought, and the Act is therefore within the constitutional power of Congress. *Johnson v. Monell*, (1869) *Woolw.* (U. S.) 390, 13 Fed. Cas. No. 7,399.

When a state a party.—Cases where the subject-matter of the controversy would give the federal judiciary jurisdiction, may originate in other courts and be removed to the Circuit Court or taken by appeal or writ of error to the Supreme Court, although a state shall be a party. *Texas v. Lewis*, (1882) 12 Fed. Rep. 5.

Suits for acts done by order of the President.—Sections 4 and 5 of the Act of March 3, 1863, providing for the removal of suits pending or to be brought for acts done by

order of the President, and when the order was made a defense therein, were held to be constitutional in *Hodgson v. Millward*, (1863) 3 Grant Cas. (Pa.) 412; *Kulp v. Ricketts*, (1863) 3 Grant Cas. (Pa.) 420; and unconstitutional in *Ohio v. Bliss*, (1863) 3 Grant Cas. (Pa.) 427; *Jones v. Seward*, (1863) 3 Grant Cas. (Pa.) 431; *Benjamin v. Murray*, (Supm. Ct. Gen. T. 1865) 28 How. Pr. (N. Y.) 193; *People v. Murray*, (N. Y. Gen. Sess. 1864) 5 Park. Crim. (N. Y.) 577.

On denial of civil rights.—Section 641, R. S., enacting that "when any civil suit or criminal prosecution is commenced in any state court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the state, or in the part of the state where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next Circuit Court of the United States to be held in the district where it is pending," was held to be constitutional, and to be fully warranted by the fifth section of the Fourteenth Amendment. *Strauder v. West Virginia*, (1879) 100 U. S. 311, *reversing State v. Strauder*, (1877) 11 W. Va. 745. See also *State v. Fairfield County*, (1864) 15 Ohio St. 384.

See also title *Judiciary*, 4 FED. STAT. ANNOT. 258.

On defense arising under Act of Congress.—An Act of Congress giving a defendant the right to remove a suit from a state court to a United States Circuit Court, on a defense arising under an Act of Congress, is valid. *Jones v. Seward*, (1864) 41 Barb. (N. Y.) 272.

Suits against United States officer.—Section 643, R. S., providing that "when any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law," the case may be removed into the federal court, was a constitutional exercise of the power of Congress. *Tennessee v. Davis*, (1879) 100 U. S. 261. See also *Findley v. Satterfield*, (1877) 3 Woods (U. S.) 504, 9 Fed. Cas. No. 4,792; *State v. Hoskins*, (1877) 77 N. Car. 530.

See also title *Judiciary*, 4 FED. STAT. ANNOT. 260.

For prejudice or local influence.—It is within the power of Congress to authorize a plaintiff who discovers, after suit brought in a state court, that the prejudice and local

influence, against which the Constitution intended to guard, are such as are likely to prevent him from obtaining justice, to remove his case into a national court, and to prescribe the conditions upon which the removal shall be allowed. *Chicago, etc., R. Co. v. Whitton*, (1871) 13 Wall. (U. S.) 289. See also *Burson v. National Park Bank*, (1872) 40 Ind. 180; *Meadow Valley Min. Co. v. Dodds*, (1871) 7 Nev. 144; *Goodman v. Oahkosh*, (1878) 45 Wis. 355.

Action at law equitable in form.—When the principal action is an action at law, the fact that under state statutes the process of attachment or garnishment against nonresidents is equitable in form, could not cut off the right of removal where diversity of citizenship exists. The right to remove given by a constitutional Act of Congress cannot be taken away or abridged by state statutes. *Courtney v. Pradt*, (1905) 196 U. S. 92.

Statute of limitations prescribed by Congress.—For such suits as may be removed from state courts into the federal courts, Congress may prescribe a statute of limitations, which is binding upon the state courts as well as upon the federal courts. *Mitchell v. Clark*, (1884) 110 U. S. 642. See also *Arnson v. Murphy*, (1883) 109 U. S. 238.

"At any time before the final hearing or trial."—An Act of Congress authorizing the removal of a suit from a state court to a United States court "at any time before the final hearing or trial of the suit" is within the power of Congress. *Home L. Ins. Co. v. Dunn*, (1873) 19 Wall. (U. S.) 228. See also *Stephens v. Howe*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 134.

Before and after judgment.—This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication as

a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner, must be subject to its absolute legislative control. *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 349, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1. On the authority of this case, it was held in *Murray v. Patrie*, (1866) 5 Blatchf. (U. S.) 343, 17 Fed. Cas. No. 9,967, that the removal of causes from the state courts to the Circuit Courts of the United States might take place after as well as before judgment.

The power of Congress to provide for the transfer, before judgment, of cases which fall within the jurisdiction of the courts of the United States, cannot be questioned. *McCormick v. Humphrey*, (1866) 27 Ind. 149.

Removing the whole suit.—An Act of Congress authorizing the removal of causes from state courts to United States Circuit Courts on petition of one nonresident defendant on the ground of local prejudice is not unconstitutional as conferring on a federal court jurisdiction to try a suit in which there is also a controversy between the plaintiff and other resident defendants. *Whelan v. New York, etc., R. Co.*, (1888) 35 Fed. Rep. 858.

Power to Remove State Criminal Cases.—The constitutional power of Congress to authorize the removal of criminal cases for alleged offenses against state laws from state courts to the Circuit Courts of the United States, when there arises a federal question in them, is as ample as its power to authorize the removal of a civil case.

Tennessee v. Davis, (1879) 100 U. S. 271.

Statute Authorizing Remand to State Court.—The inferior courts, while authorized by the Constitution, owe their powers and jurisdiction immediately to Congress, and can have no powers not conferred by Congress, and the same power which has conferred jurisdiction may take away jurisdiction previously conferred. The clause in the Act of March 3, 1887, that "at any time before the trial of any suit which is now pending in any Circuit Court, or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe, and did believe, that from prejudice or local influence he was unable to obtain justice in said state court, the Circuit Court shall, on the application of the other party,

examine into the truth of said affidavit, and the grounds thereof; and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto," is constitutional. Upon the removal of a cause from a state court, the jurisdiction is not so utterly devastated that it cannot be restored by a proper order of the federal court. The effect of an order remanding a cause is simply the restoration of a jurisdiction previously acquired by the state court, but held in abeyance during the pendency of the cause in the federal court, rather than the investiture of original jurisdiction.

Birdseye v. Shaeffer, (1888) 37 Fed. Rep. 828. See also *Manley v. Olney*, (1887) 32 Fed. Rep. 709.

See Act of March 3, 1875, section 5, as amended by the Acts of 1887 and 1888, under the title *Judiciary*, 4 FED. STAT. ANNOT. 371.

XXIII. STATE LAWS AS AFFECTING FEDERAL JURISDICTION — 1. Cannot Abridge or Impair Jurisdiction. — The jurisdiction conferred upon the national courts cannot be abridged or impaired by any state statute.

Barrow Steamship Co. v. Kane, (1898) 170 U. S. 111. See also *Home Ins. Co. v. Morse*, (1874) 20 Wall. (U. S.) 453; *Fidelity Trust Co. v. Gill Car Co.*, (1885) 25 Fed. Rep. 738;

National Bank v. Sebastian County, (1879) 5 Dill. (U. S.) 414, 17 Fed. Cas. No. 10,040; *Mason v. West Branch Boom Co.*, (1858) 3 Wall. Jr. (C. C.) 252, 16 Fed. Cas. No. 9,232.

2. Substantial Rights Given May Be Enforced. — A state law cannot give jurisdiction to any federal court, but it may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence.

Ex p. McNiel, (1871) 13 Wall. (U. S.) 243. See also the following cases:

United States. — *Home Ins. Co. v. Morse*, (1874) 20 Wall. (U. S.) 453; *Buford v. Holley*, (1886) 28 Fed. Rep. 683.

California. — *Greely v. Townsend*, (1864) 25 Cal. 614.

Louisiana. — *Collier v. Stanbrough*, (1843) 6 Rob. (La.) 230.

The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States. *The Steam-Boat Orleans v. Phœbus*, (1837) 11 Pet. (U. S.) 183.

3. Respecting Fraudulent Conveyances. — A statute which provides that "a creditor, without a lien, may file a bill in chancery to subject to the payment of his debt any property which has been fraudulently transferred or attempted to be fraudulently conveyed by his debtor," is operative in the courts of the United States.

Buford v. Holley, (1886) 28 Fed. Rep. 681.

4. Requiring Demand Before Suit Against County. — A provision of a state statute requiring that before suit is brought upon an unliquidated claim against a county the same must be presented to, and a demand for payment be made of, the board of supervisors, is not intended to affect or impair the jurisdiction of the federal courts, nor to deny the right of citizens of other states to sue therein, nor to control, limit, or impair the rights and remedies of

patentees, nor does it seek to deal with subjects beyond the legislative control of the state. Legislation of this character no more affects the jurisdiction of the federal courts, or the rights of citizens of other states, than the legislation touching demand and notice of nonpayment of commercial paper, and many other subjects in respect to which the federal courts adopt the statutory enactments as the rule to be followed by those courts.

May v. Jackson County, (1888) 35 Fed. Rep. 711.

5. Requiring County to Be Sued in the County Court. — A state statute exempting the counties of the state from suit elsewhere than in the Circuit Courts of the county cannot limit the jurisdiction of the federal courts.

Cowles v. Mercer County, (1868) 7 Wall. (U. S.) 118.

6. Domestication of Foreign Corporations. — A state statute which requires a foreign corporation, as a condition to doing business within the state, to file a stipulation with the secretary of state not to remove a suit against a corporation into the federal court, is unconstitutional.

Barron v. Burnside, (1887) 121 U. S. 197.
See also the following cases:

United States. — *Home Ins. Co. v. Morse*, (1874) 20 Wall. (U. S.) 458; *Chicago, etc., R. Co. v. Becker*, (1887) 32 Fed. Rep. 853.

Ohio. — *Thoms v. Greenwood*, (1878) 7 Am. L. Rec. 320, 6 Ohio Dec. (Reprint) 639.

West Virginia. — *Rece v. Newport News, etc., Co.*, (1889) 32 W. Va. 164.

But see *Goodrel v. Kreichbaum*, (1886) 70 Iowa 363.

Domestication of Foreign Corporations as Affecting Jurisdiction. — A state statute which provides that every railroad corporation of any other state which has theretofore leased or purchased any railroad in that state shall, within sixty days from the passage of the Act, file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a domestic corporation, anything in its articles of incorporation or charter notwithstanding, does not create a domestic corporation out of a foreign corporation which has complied with the provisions of the statute, so as to make it a domestic corporation within the meaning of the Federal Constitution, and to subject it, as such, to a suit by a citizen of the state of its origin.

St. Louis, etc., R. Co. v. James, (1896) 161 U. S. 564.

A North Carolina statute entitled "An Act to provide a manner in which foreign corporations may become domestic corporations," does not have the effect of licensing or pretend to license a corporation to do

business within the state; but in legal intention and effect creates a domestic corporation, and a corporation so domesticated cannot remove an action into the federal courts solely by virtue of its prior incorporation by some other state. *Debnam v. Southern Bell Telephone, etc., Co.*, (1900) 126 N. Car. 831.

Cancellation of License of Insurance Company Removing Cause from State Court. — A state statute declaring that if a foreign insurance company shall remove any case from its state court into the federal courts, contrary to the provisions of a prior statute, it shall be the duty of the secretary of state immediately to cancel its license to do business within the state, is valid. As such a foreign corporation is one upon which any terms, conditions, or restrictions may be imposed which the state may think proper, as a condition of coming into or doing business within its territory, the state has the correlative power to revoke or recall a

permission and the power to judge of the cases in which the revocation shall be made.

Doyle v. Continental Ins. Co., (1876) 94 U. S. 542, wherein the court said: "It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an 'inexact statement.' The effect of our decision in this respect is

that the state may compel the foreign company to abstain from the federal courts, or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state; that state has authority at any time to declare that it shall not transact business there."

ARTICLE III., SECTION 2.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

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I. ORIGINAL JURISDICTION OF SUPREME COURT — 1. "Ambassadors, Other Public Ministers and Consuls" — a. IN GENERAL. — The construction of the words "ambassadors, other public ministers and consuls," used in the clause defining the power of appointments, as including all the contents of the class, is confirmed by the use of the same words in this clause, meaning all possible diplomatic agents which any foreign power may accredit to the United States.

Ambassadors and Other Public Ministers of U. S., (1855) 7 Op. Atty.-Gen. 209.

b. OFFENSE OF OFFERING VIOLENCE TO A FOREIGN MINISTER. — An indictment under an Act of Congress for infracting the law of nations by offering violence to the person of a foreign minister is not a case “affecting ambassadors, other public ministers and consuls.” It is that of a public prosecution, instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and that of the United States, offended, as the indictment charges, in the person of a public minister, by an assault committed on him by a private individual. It is a case, then, which affects the United States, and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution or in the costs attending it.

U. S. v. Ortega, (1826) 11 Wheat. (U. S.) 467.

c. CERTIFICATE OF STATE DEPARTMENT EVIDENCE OF PRIVILEGE. — The Supreme Court has the right to accept the certificate of the state department that a party is or is not a privileged person.

In re Baiz, (1890) 135 U. S. 431.

2. “In Which a State Shall Be Party” — a. LIMITED TO CASES ENUMERATED IN PRECEDING CLAUSE. — The original jurisdiction of the Supreme Court, in cases where a state is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a state and its citizens, and, perhaps, every case in which a state is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate and only in the appellate form.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 398.

“This paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the first paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the state of Minnesota is a party to this litigation. It must also appear that the case is one to which by the first paragraph the judicial power of the United States extends.” *Minnesota v. Hitchcock*, (1902) 185 U. S. 383.

“The language of the second clause of the second section of Article III., ‘in all cases in which a state shall be party,’ means in all the enumerated cases in which a state shall be a party, and this is stated expressly

when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only.” *Louisiana v. Texas*, (1900) 176 U. S. 15.

“The words in the Constitution, ‘in all cases . . . in which a state shall be party,’ the Supreme Court shall have original jurisdiction,” necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff.” *U. S. v. Texas*, (1892) 143 U. S. 643.

b. WHETHER PARTY PLAINTIFF OR PARTY DEFENDANT. — The original jurisdiction vested by the Constitution in this court over controversies in which

a state is a party is not affected by the question whether the state is a party plaintiff or party defendant.

Minnesota v. Hitchcock, (1902) 185 U. S. 388.

c. **MUST HAVE DIRECT INTEREST IN CONTROVERSY.** — A state may prosecute a suit in the Supreme Court of the United States when it claims a direct interest in the controversy and it appears that the power of the court can redress its wrongs and save it from irreparable injury.

Pennsylvania v. Wheeling, etc., Bridge Co., (1851) 13 How. (U. S.) 559.

Must be nominally or substantially a party. — A case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case in which a state is

either nominally or substantially the party. It is not sufficient that a state may be consequentially affected. *Fowler v. Lindsay*, (1799) 3 Dall. (U. S.) 411, holding that a decision as to the right of soil, between individual citizens, can never affect the right of a state as to the soil or jurisdiction.

d. **TO COMPEL PERFORMANCE OF OBLIGATIONS.** — The Supreme Court will decline to take jurisdiction of suits between states to compel the performance of obligations which, if the states had been independent nations, could not have been enforced judicially, but only through the political department of their governments.

Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 288.

e. **QUESTIONS OF BOUNDARY** — (1) *Between Two States.* — The Supreme Court has jurisdiction of questions of boundary between two states of this Union, and this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceeding.

Virginia v. West Virginia, (1870) 11 Wall. (U. S.) 55. See also *U. S. v. Texas*, (1892) 143 U. S. 640.

The Supreme Court of the United States has jurisdiction of a suit brought by one state against another state on a question of boundary. "There can be but two tribunals under the Constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited in express terms to assent or dissent where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court when a state is a party, the power is here or it cannot exist. For these reasons we cannot be persuaded that it could have been intended to provide only for the settlement of boundaries when states could agree, and to altogether withhold the power to decide controversies on which the states could not agree, and present the most imperious call for speedy set-

tlement." *Rhode Island v. Massachusetts*, (1838) 12 Pet. (U. S.) 720, wherein the court further said: "When, therefore, the court judicially inspects the articles of confederation, the preamble to the Constitution, together with the surrender, by the states, of all power to settle their contested boundaries, with the express grant of original jurisdiction to this court, we feel not only authorized but bound to declare that it is capable of applying its judicial power to this extent at least: 1. To act as the tribunal substituted by the Constitution in place of that which existed at the time of its adoption, on the same controversies, and to a like effect. 2. As the substitute of the contending states, by their own grant, made in their most sovereign capacity, conferring that pre-existing power, in relation to their own boundaries, which they had not surrendered to the legislative department, thus separating the exercise of political from judicial power, and defining each."

Right of United States Attorney-General to Intervene. — A question of boundary between the states is within the original jurisdiction conferred on the Supreme Court. In such a case the attorney-general of the United States may intervene and file testimony, without making the United States a party in the technical

sense of the term, but he will have no right to interfere in the pleading, or evidence, or admissions of the states, or of either of them, and when the case is ready for argument the court will hear the attorney-general as well as the counsel for the respective states, and in deciding upon the true boundary line will take into consideration all the evidence which may be offered by the United States, or either of the states. But the court does not regard the United States in this mode of proceeding as either plaintiff or defendant, and they are, therefore, not liable to a judgment against them or entitled to a judgment in their favor.

Florida v. Georgia, (1854) 17 How. (U. S.) 491.

(2) *Between a State and a Territory*. — The Supreme Court cannot take cognizance of an original suit brought by the United States against a state to determine the boundary between one of the territories and such state.

U. S. v. Texas, (1892) 143 U. S. 641, holding that the settlement of a dispute as to a boundary between a territory and a state is not limited to an action at law, and an Act

of Congress requiring the institution of a suit in equity to determine such question is constitutional.

f. ACTS ENDANGERING ADJACENT STATE. — The acts of one state in seeking to promote the health and prosperity of its inhabitants by a system of public works which endangers the health and prosperity of the inhabitants of another and adjacent state create a sufficient basis for a controversy within the original jurisdiction of the Supreme Court.

Missouri v. Illinois, (1901) 180 U. S. 208.

g. OBSTRUCTION TO NAVIGATION BY BRIDGE. — A state may bring a suit in equity for the protection of its property on the same ground and to the same extent as a corporation or individual may ask it. If a bridge built across a navigable river in one state be such an obstruction to the navigation as to change to any considerable extent the line of transportation through another state through which also the river flows, an injury is done to the latter state, and this injury is of a character for which an action at law could afford no adequate redress, and presents a case for the extraordinary interposition of a court of chancery.

Pennsylvania v. Wheeling, etc., Bridge Co., (1851) 13 How. (U. S.) 561.

h. DEPRIVING ADJOINING STATE OF NATURAL FLOW OF WATER. — The jurisdiction of the Supreme Court in controversies between states is not limited to such controversies as, prior to the Union, would have been just cause for reprisal by a complaining state under the law of nations, but the court may apply federal, state, and international law, as the exigencies of the particular case may demand, and may take jurisdiction of the question as to the power of one state of the Union wholly to deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter.

Kansas v. Colorado, (1902) 185 U. S. 145.

i. ACTION ON JUDGMENT RECOVERED BY STATE AGAINST FOREIGN CORPORATION. — The Supreme Court has no jurisdiction of an action brought by a

state upon a judgment recovered by that state in one of her own courts against an insurance corporation, a citizen of another state, for penalties imposed by a state statute for not making returns to the insurance commissioner of the state as required by that statute.

Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 286.

j. STATE REORGANIZED BY PROVISIONAL GOVERNMENT. — A state reorganized by the appointment of a provisional governor by the President in 1865, the election of a governor in 1866, under the state constitution of that year, and the subsequent appointment of a governor by the military commander of the district, was not in condition to sue as a state in the United States Supreme Court.

Texas v. White, (1868) 7 Wall. (U. S.) 717.

k. MAY BE REPRESENTED BY GOVERNOR. — Where the state is a party, plaintiff or defendant, the governor represents the state, and the suit may be, in form, a suit by him as governor in behalf of the state, where the state is plaintiff, and he must be summoned or notified as the officer representing the state where the state is defendant.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 98.

l. SUIT INSTITUTED BY ATTORNEY-GENERAL EVIDENCE OF CONSENT OF STATE. — The fact that the attorney-general of a state has instituted proceedings in the Supreme Court of the United States is sufficient evidence that the state has consented to the prosecution of the suit in its name.

Pennsylvania v. Wheeling, etc., Bridge Co., (1851) 13 How. (U. S.) 559.

3. Exclusiveness of Original Jurisdiction. — The original jurisdiction of the Supreme Court, in cases where a state is a party, is not made exclusive by the Constitution, and it is competent for Congress to authorize suits by a state to be brought in the inferior courts of the United States.

Ames v. Kansas, (1884) 111 U. S. 469, wherein the court said: "In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grants shall be made, and it may safely be assumed that nothing will ever be done to entrench upon the high privileges of those for whose protection the constitutional provision was intended. At any rate, we are unwilling to say that the power to make the grant does not exist." See also *Börs v. Preston*, (1884) 111 U. S. 256; *U. S. v. Ravara*, (1793) 2 Dall. (U. S.) 297; *Alabama v. Wolfe*, (1883) 18 Fed. Rep. 837; *Texas v. Lewis*, (1882) 12 Fed. Rep. 5.

In all cases of original jurisdiction. — The clause does not confer upon that court exclusive jurisdiction in such cases, and it is within the power of Congress to grant to inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction only. *Louisiana v. U. S.*, (1887) 22 Ct. Cl. 88, *affirmed U. S. v. Louisiana*, (1887) 123 U. S. 36.

Statutory provisions. — The word "original" is used solely in contradistinction to the word "appellate," and this use indicates that the former word was not intended to make exclusive the jurisdiction which it otherwise qualifies. So much of section 687, R. S. U. S., as provides that the jurisdiction of the Supreme Court in suits in which a consul is a party shall not be exclusive, and subdivision 17 of section 563, R. S. U. S., which provides that the District Courts shall have jurisdiction "of all suits against consuls," are valid. *Pooley v. Luco*, (1896) 76 Fed. Rep. 147.

See sections 563 and 687, R. S., under title *Judiciary*, 4 FED STAT. ANNOT. 235, 436.

4. Congress Without Power to Enlarge or Restrict Original Jurisdiction. —

The constitutional limitation of the original jurisdiction of the Supreme Court is restrictive of any other original jurisdiction. The rule of construction of the Constitution being that affirmative words of the Constitution declared in what cases the Supreme Court shall have original jurisdiction must be construed negatively as to all other cases.

Ex p. Vallandigham, (1863) 1 Wall. (U. S.) 252. See also *Martin v. Hunter*, (1816) 1 Wheat. (U. S.) 330, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1; *U. S. v. Haynes*, (1887) 29 Fed. Rep. 696.

Negative of jurisdiction in other cases. — The grant of original jurisdiction to the Supreme Court of certain cases is negative or exclusive of the exercise of original jurisdiction in other cases. "If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction, made in the Constitution, is form without substance." *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 174.

"In the case of *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 174, the single question before the court, so far as that case can be applied to this, was whether the legislature could give this court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, 'it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested.' The court says that such a construction would render the clause dividing the jurisdiction of the court into original and appellate totally useless; that 'affirmative words are often,

in their operation, negative of other objects than those which are affirmed, and in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to them, or they have no operation at all.' 'It cannot be presumed,' adds the court, 'that any clause in the Constitution is intended to be without effect, and therefore such a construction is inadmissible unless the words require it.' The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is to apply the conclusion to which the court was conducted by that reasoning in the particular case to one in which the words have their full operation when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article. To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case or the tenor of its reasoning." *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 400.

5. Limit of Amount in Controversy. — The original jurisdiction of the Supreme Court is conferred without limit of the amount in controversy, and it is questionable whether Congress could impose any such limit.

Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 286.

6. Power of Court to Regulate Process. — In all cases where original jurisdiction is given by this clause, the Supreme Court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 98.

Although Congress has undoubtedly the right to prescribe the process and mode of proceeding in cases of which the Supreme Court has original jurisdiction, as fully as in any other court, yet the omission to legislate

on the subject could not deprive the court of the jurisdiction conferred; in the absence of any legislation by Congress the court itself is authorized to prescribe its mode and form of proceeding so as to accomplish the ends for which the jurisdiction was given. *Florida v. Georgia*, (1854) 17 How. (U. S.) 491.

7. Prize Causes.—An application to intervene cannot be first made in the Supreme Court; as such an application is in its nature original and not appellate, and that court has no original jurisdiction in prize causes.

The *William Bagaley*, (1866) 5 Wall. (U. S.) 412, citing *The Harrison*, (1816) 1 Wheat. (U. S.) 298; *Marbury v. Madison*, (1803) 1 Cranch (U. S.) 173.

8. Mandamus.—The Supreme Court has not power to issue a mandamus to the secretary of state of the United States in the exercise of original jurisdiction. To enable that court to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable it to exercise appellate jurisdiction.

Marbury v. Madison, (1803) 1 Cranch (U. S.) 175. See also *McCluney v. Silliman*, (1817) 2 Wheat. (U. S.) 369, as to a motion for a mandamus to a register of the land

office of the United States commanding him to enter an application for certain tracts of land. See *supra*, *Control of executive officers by mandamus or injunction*, p. 72.

9. Habeas Corpus.—The Supreme Court may issue a writ of habeas corpus in aid of its original jurisdiction.

Ex p. Watkins, (1833) 7 Pet. (U. S.) 572.

Only in aid of jurisdiction.—Except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, a writ of habeas corpus can only be issued by the Supreme Court for the review of a judicial decision of some inferior officer or court. *Ex p. Hung Hang*, (1883) 108 U. S. 552.

The Supreme Court of the United States

cannot issue any writ of habeas corpus except when it is necessary for the exercise of a jurisdiction, original or appellate, given to it by the Constitution or laws of the United States, and therefore the original jurisdiction of the court does not extend to the case of a petition by a private individual for a habeas corpus to bring up the body of an infant daughter alleged to be unlawfully detained from him. *Ex p. Barry*, (1844) 2 How. (U. S.) 65.

II. APPELLATE JURISDICTION OF SUPREME COURT — 1. General Appellate Power.

—Appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction.

Martin v. Hunter, (1816) 1 Wheat. (U. S.) 337, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1.

Federalist.—A circumstance which crowns the defects of the confederation remains yet to be mentioned—the want of a judicial power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uni-

formity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each state a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number

of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and

declare in the last resort a uniform rule of civil justice. Hamilton, in *The Federalist*, No. XXII.

2. Over Inferior Federal Courts. — The judicial action of all inferior courts established by Congress may be, in accordance with the Constitution, subjected to the appellate jurisdiction of the supreme judicial tribunal of the government.

U. S. v. Coe, (1894) 155 U. S. 82.

Not from special tribunals. — Exclusively judicial power is conferred on the Supreme Court, and it cannot be required or authorized to exercise any other. The court has no appellate power over special tribunals, and cannot, under the Constitution, take

jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court. *Gordon v. U. S.*, (1864) 117 U. S. 699.

3. Over State Tribunals. — The appellate power of the United States extends to cases pending in the state courts, and an Act of Congress authorizing the exercise of this jurisdiction in specified cases, by writ of error, is supported by the letter and spirit of the Constitution.

Martin v. Hunter, (1816) 1 Wheat. (U. S.) 351, reversing *Hunter v. Martin*, (1814) 4 Munf. (Va.) 1. But see *Johnson v. Gordon*, (1854) 4 Cal. 368.

Without the Supreme Court, as it has been constitutionally and legislatively constituted, neither the Constitution nor the laws of Congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction that the judges in every state should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding, would be useless, if the judges of state courts, in any one of the states, could finally determine what was the meaning and operation of the Constitution and laws of Congress, or the extent of the obligation of treaties. *Dodge v. Woolsey*, (1855) 18 How. (U. S.) 355.

The Supreme Court may exercise appellate jurisdiction over the judgment of a state court. The Constitution gives to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description in whatever court they may be decided. *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 416.

Statute must be strictly followed. — The statute giving the United States Supreme Court jurisdiction on writ of error to the state supreme courts must be strictly fol-

lowed. There is no unlimited right of appeal from such courts. *Ferris v. Coover*, (1858) 11 Cal. 175.

Federalist. — Here another question occurs: What relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Hamilton, in *The Federalist*, No. LXXXII.

The Appellate Power Is Conferred in All Cases Enumerated in the general grant of judicial power. It is not confined to suits in the inferior courts of the United States, but extends to all cases where such question arises, whether it be in a judicial tribunal of a state or of the United States.

Ableman v. Booth, (1858) 21 How. (U. S.) 518.

Under an Act of Congress providing that "a final judgment or decree in any suit in

the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against

their validity; or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed, or affirmed in the Supreme Court upon a writ of error," it was held that the court had appellate jurisdiction to revise and correct a judgment in a suit between two citizens of the same state in a court in their state, claiming title under the same Act of Congress, as the Constitution, when considered in connection with the statute, would give it a more extensive construction than it might otherwise receive. *Matthews v. Zane*, (1808) 4 Cranch (U. S.) 382. See also *Ferris v. Coover*, (1858) 11 Cal. 179, the court saying:

"That there should be a central tribunal, having power to give authoritative exposition to the Constitution, and laws, and treaties of the United States, and which should also possess the power to secure to every citizen the rights to which he is entitled under them, seems to us highly expedient. The value of uniformity of decisions where the Constitution and laws of the federal government are to be expounded in cases of individual rights, and the importance of the principle that every citizen of the United States know the extent, and be protected by a tribunal of the highest authority and free from local prejudices or passions in the enjoyment, of all the rights, exemptions, and privileges with which the Constitution and laws of the Union invest him, cannot easily be exaggerated. Indeed, in order to render the Constitution and laws of the federal government the same things to the people of the United States, it is necessary that they receive their ultimate construction from the same tribunal; for there is but little practical difference between two or more different constitutions and one constitution variously and differently construed."

4. Confined to Limits Prescribed by Statute.— While the appellate power of the Supreme Court of the United States extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe.

The *Francis Wright*, (1881) 105 U. S. 385.

"The doctrine of the Constitution and of the cases thus far may be summed up in these propositions: (1) The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution. (2) The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States. (3) This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations, as Congress, in the exercise of its discretion, has made or may see fit to make. (4) Congress not only has not excepted writs of habeas corpus and mandamus from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs." *Ex p. Yerger*, (1868) 8 Wall. (U. S.) 98.

If the Judicial Act Had Created the Supreme Court, Without Defining or Limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the Constitution assigns to it. The legislature would have exercised the power it possesses of creating a Supreme Court as ordained by the Constitution; and, in omitting to exercise the rights of excepting from its constitutional powers, would have necessarily left those powers undiminished.

Durousseau v. U. S., (1810) 6 Cranch (U. S.) 313. See also *U. S. v. More*, (1805) 3 Cranch (U. S.) 170.

5. Validity of Federal and State Statutes.— The Supreme Court of the United States is the ultimate tribunal to determine whether laws enacted by Congress

Negation of jurisdiction not affirmed.— The affirmation of appellate jurisdiction in the Supreme Court by Acts of Congress implies the negation of all such jurisdiction not affirmed. *Ex p. McCardle*, (1868) 7 Wall. (U. S.) 513. See also *Durousseau v. U. S.*, (1810) 6 Cranch (U. S.) 313; *U. S. v. More*, (1805) 3 Cranch (U. S.) 171; *Wiscart v. Dauchy*, (1796) 3 Dall. (U. S.) 321.

The Constitution did not undertake to distribute the jurisdiction otherwise than by expressly extending the original jurisdiction of the Supreme Court to certain named cases—that subject being left to Congress—the Constitution in that respect not being self-executing. Consequently the appellate jurisdiction of the Supreme Court can only be exercised in accordance with the Acts and regulations of Congress upon that subject. *Nashville, etc., R. Co. v. Taylor*, (1898) 86 Fed. Rep. 171.

or by the state legislatures or decisions of state courts are in conflict with the Constitution of the United States.

Dodge v. Woolsey, (1855) 18 How. (U. S.) 347, wherein the court said: "The appellate jurisdiction of the Supreme Court, as it is, is one of perfect equality between the states and the United States. It acts upon the Constitution and laws of both, in the same way, to the same extent, for the same purposes, and with the same final result. Neither the dignity nor the independence of either are lessened by its organization or action."

The supremacy of the federal government conferred by the clause which declares that the Constitution, laws, and treaties of the United States shall be the supreme law, could not peacefully be maintained unless it was clothed with judicial power equally paramount in authority to carry it into execution.

For if left to the courts of justice of the several states conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from local influences. Accordingly, it was conferred on the general government, in clear, precise, and comprehensive terms. It is declared by the Constitution that its judicial power shall (among other subjects enumerated) extend to all cases in law or equity arising under the Constitution and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. *Ableman v. Booth*, (1858) 21 How. (U. S.) 518.

6. As to Law and Facts. — Congress has the power to confine the jurisdiction of the Supreme Court on appeals in admiralty to questions at law arising on the record.

The *Francis Wright*, (1881) 105 U. S. 386, wherein the court said: "Undoubtedly, if Congress should give an appeal in admiralty causes, and say no more, the facts, as well as the law, would be subjected to review and retrial; but the power to except from — take out of — the jurisdiction, both as to law and fact, clearly implies a power to limit the effect of an appeal to a review of the law as applicable to facts finally determined below. Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals."

Federalist. — The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; but the clamors have been loud against it as applied to matters of fact. Some well-intentioned men in this state, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery. A technical sense has been affixed to the term "appellate," which, in our law parlance, is commonly used in reference to appeals in the course of the civil law. But

if I am not misinformed, the same meaning would not be given to it in any part of New England. There an appeal from one jury to another is familiar both in language and practice, and is even a matter of course, until there have been two verdicts on one side. The word "appellate," therefore, will not be understood in the same sense in New England as in New York, which shows the impropriety of a technical interpretation derived from the jurisprudence of any particular state. The expression, taken in the abstract, denotes nothing more than the power of one tribunal to review the proceedings of another, either as to the law or fact, or both. The mode of doing it may depend on ancient custom or legislative provision (in a new government it must depend on the latter), and may be with or without the aid of a jury, as may be judged advisable. If, therefore, the re-examination of a fact once determined by a jury should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court. Hamilton, in *The Federalist*, No. LXXXI.

7. In Prize Causes. — In prize causes the Supreme Court can exercise appellate jurisdiction only. An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal from which an appeal has been taken, and by an Act of Congress providing that prize causes depending in the Circuit Courts might be transferred, upon the application of all parties in interest, to the Supreme Court, an attempt was inadvertently made to give to the Supreme Court a jurisdiction withheld by the Constitution.

The Alicia, (1868) 7 Wall. (U. S.) 573.

8. Certiorari to Review Proceedings of a Military Commission. — The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the Acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress. A writ of certiorari cannot be issued by the Supreme Court of the United States to review the proceedings of a military commission. It is not in law or equity within the meaning of those terms as used in the Constitution, nor is a military commission a court within the meaning of the Judiciary Act of 1789.

Ex p. Vallandigham, (1863) 1 Wall. (U. S.) 251.

9. Habeas Corpus. — In a proper case the Supreme Court, under Acts of Congress giving jurisdiction in cases of habeas corpus, may, in the exercise of its appellate power, revise the decisions of inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress.

Ex p. Yerger, (1868) 8 Wall. (U. S.) 98.
See *Ex p. Bollman*, (1807) 4 Cranch (U. S.) 93.

the jurisdiction of the Supreme Court is appellate, it must be shown that the court has the power in a particular case to award a habeas corpus. *Ex p. Milburn*, (1835) 9 Pet. (U. S.) 704.

Power to issue writ must be shown. — As

ARTICLE III., SECTION 2.

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

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II. APPLICABLE TO DISTRICT OF COLUMBIA AND TERRITORIES, 128.

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1. *In General*, 131.
2. *Boundary of State a Question of Fact*, 132.

VIII. AT SUCH PLACE AS CONGRESS MAY DIRECT, 132.

I. LIMITED TO TRIALS IN THE FEDERAL COURTS. — This article is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that the trial of all crimes, except in cases of impeachment, shall be by jury.

Eilenbecker v. District Ct., (1890) 134 U. S. 35; *Nashville, etc., R. Co. v. Alabama*, (1888) 128 U. S. 101; *Ex p. Pritchard*, (1890) 43 Fed. Rep. 915; *Territory v. Hat-*

tick, (1811) 2 Mart. (La.) 88; *Murphy v. People*, (1824) 2 Cow. (N. Y.) 818; *State v. Caldwell*, (1894) 115 N. Car. 803; *Ex p. McNeeley*, (1892) 36 W. Va. 95.

II. APPLICABLE TO DISTRICT OF COLUMBIA AND TERRITORIES. — To the District of Columbia this provision of the Constitution applies.

Callan v. Wilson, (1888) 127 U. S. 549.

To the Territories of the United States the provisions relating to trials by jury for crimes and to criminal prosecutions apply.

Thompson v. Utah, (1898) 170 U. S. 347.

III. TRIAL BY MILITARY COMMISSION. — This provision was infringed by the trial of a citizen, in a state which upheld the authority of the government and where the courts were open and their process unobstructed, by a military commission, a court not ordained and established by Congress.

Ex p. Milligan, (1866) 4 Wall. (U. S.) 115.

IV. CLASSES OF OFFENSES INCLUDED — 1. In General. — This provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen.

Callan v. Wilson, (1888) 127 U. S. 549, wherein the court further said: "The guaranty of a trial by jury, in the Third Article, implied a trial in that mode and according to the settled rules of the common law; the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those

rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

2. Petty Offenses Not Included. — The class or grade of offenses called petty offenses may, according to the common law, be proceeded against summarily in any tribunal legally constituted for that purpose.

Joyce v. Chillicothe Foundry, (1888) 127 U. S. 557.

In *Blackstone's Commentaries*, book iv., p. 5, is given a definition of the word "crimes": "A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." "In the light of this definition we can appreciate the action of the convention which framed the Constitution.

In the draft of that instrument, as reported by the committee of five, the language was, 'the trial of all criminal offenses * * * shall be by jury,' but by unanimous vote it was amended so as to read 'the trial of all crimes.' The significance of this change cannot be misunderstood. If the language had remained 'criminal offenses,' it might have been contended that it means all offenses of a criminal nature, petty as well as serious; but when the change was made from 'criminal offenses' to 'crimes,' and made in the light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Schick v. U. S.*, (1904) 195 U. S. 69.

3. Petty Larceny. — Petty larceny was never regarded at common law as a petty offense, but as a felony, and was always triable by jury.

In re Fauldan, (1892) 20 D. C. 433.

4. Receiving Stolen Goods. — Receiving stolen goods cannot be regarded as one of the petty offenses which under the Constitution are not to be tried by a jury.

U. S. v. Jackson, (1892) 20 D. C. 427.

5. Assault and Battery. — Where a party is charged with not only an assault, but with beating and wounding, he is entitled to a trial by jury.

In re Robinson, (1892) 20 D. C. 571.

6. Gambling. — Gaming, as defined and punished by section 2 of the Act of Congress of Jan. 31, 1883, relating to the District of Columbia, is to be regarded as one of the petty crimes not embraced by the provision of the Constitution relating to trial by jury.

U. S. v. Herzog, (1892) 20 D. C. 431.

9 F. S. A. — 9

7. Proceeding for Contempt. — In a proceeding for contempt the party is not entitled to a trial by jury.

In re Terry, (1889) 37 Fed. Rep. 651.

8. Proceedings for Removal of Chinese. — So much of section 4 of the Act of May 5, 1892, known as the "Geary Act," providing for the imprisonment at hard labor for a period not exceeding one year of any Chinese person, or person of Chinese descent, convicted and adjudged by the commissioner to be not lawfully entitled to be or remain in the United States, is clearly in conflict with this clause.

U. S. v. Wong Dep Ken, (1893) 57 Fed. Rep. 211. See also *In re Ah Yuk*, (1893) 53 Fed. Rep. 781.

The provision for detention at hard labor, to be undergone before the sentence of deportation is to be carried into effect, violates the Fifth Amendment. *Wong Wing v. U. S.*, (1895) 163 U. S. 235.

Section 4 of the Chinese Exclusion Act of 1892, providing "that any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided," should be construed, not as creating a criminal offense, but as prescribing merely a method of removal and requiring certain detention as an incident. As the statute does not make provision for a jury trial, it cannot be construed as creating a criminal offense, or as declaring a punishment appropriate thereto, without rendering it obnoxious. *In*

re Sing Lee, (1893) 54 Fed. Rep. 337. See also *U. S. v. Hing Quong Chow*, (1892) 53 Fed. Rep. 233; *In re Ng Loy Hoe*, (1892) 53 Fed. Rep. 914.

Section 13 of the Act of Sept. 13, 1888, which provides that upon the filing of an affidavit which charges that a person is a Chinese person or person of Chinese descent, and that he is unlawfully in the country, a warrant may issue for the arrest of such person, who may be then brought before a commissioner and tried upon the issues raised by the allegations of the affidavit, was held by the district judge at chambers to be unconstitutional for the reason that persons other than Chinese may, by virtue of its provision, be arrested and possibly deported, and that it fails to provide for those protections guaranteed by the Constitution to persons within the United States. *U. S. v. Coe*, 128 Fed. Rep. 200, reversed in the Supreme Court, 196 U. S. 635, on the ground that an appeal from the decision of the commissioner was an appeal to the District Court and not to the district judge.

9. Suspension of Pilot for Negligence. — The negligence of a pilot which authorizes his suspension is not a crime or criminal proceeding within the meaning of the Constitution of the United States, and a statutory proceeding for his suspension is not invalid for failing to provide for trial by jury.

Low v. Commissioners of Pilotage, (1830) R. M. Charl. (Ga.) 302.

V. RIGHT TO JURY TRIAL IN THE FIRST COURT. — Except in that class or grade of offenses called petty offenses, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution.

Joyce v. Chillicothe Foundry, (1888) 127 U. S. 557.

An accused person is entitled to be convicted or acquitted in the first instance by a

jury, and an Act of Congress providing that in the District of Columbia prosecutions of simple misdemeanors should be by information under oath, without indictment by grand jury or trial by petit jury, but any party

feeling himself aggrieved by the judgment of the court might appeal to the criminal court held by a justice of the Supreme Court of the District of Columbia, and in such case the appeal shall be tried on the information

filed in the court below, certified to the criminal court, by jury in attendance thereat, as though the case had originated therein, was held to be invalid. *Matter of Dana*, (1873) 7 Ben. (U. S.) 1, 6 Fed. Cas. No. 3,554.

VI. WAIVER OF JURY TRIAL. — A waiver of a jury by persons charged with crime and consent to trial by the court is not in conflict with law.

Schick v. U. S., (1904) 195 U. S. 67.

Waiver authorized by statute. — An Act of Congress providing "that prosecutions in the Police Court (of the District of Columbia) shall be on information by the proper prosecuting officer; in all prosecutions within the jurisdiction of said court, in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury," is valid. *Belt v. U. S.*, (1894) 4 App. Cas. (D. C.) 32, in which case the court said: "It is supposed to antagonize the second section of the Third Article of the Constitution, which provides in peremptory terms that 'the trial of all crimes shall be by jury.' And it is argued that there is a distinction between this peremptory language and the language, more or less permissive, of the Sixth and Seventh Amendments to the Constitution, the former of which provides that 'in all criminal cases the accused shall enjoy the right to a speedy and public trial,' etc., and the latter of which specifies that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be

preserved.' It is claimed that while there may be a waiver of right under these amendments, there can be no waiver of the right secured by the third article, and that Congress may not validly authorize such waiver. In view of the beneficial results sought to be subserved, and of the change in public sentiment and public policy which we have remarked, we would hesitate under any circumstances to declare unconstitutional an Act of Congress which was enacted, not hastily and without due consideration, but with special and express reference to constitutional requirement. The statute is not only an expression of the increasing necessity of dealing summarily with the minor crimes that harass our society: it is likewise an expression fully justified by experience of the ability of the courts of law to deal justly with the accused, without the intervention of juries."

In the absence of express statutory authority no accused person can waive the right of trial by jury in a criminal case and elect to be tried by the court. *Belt v. U. S.*, (1894) 4 App. Cas. (D. C.) 32.

By the waiver of a jury trial in a police court a defendant is not bound, as the police court could not grant a trial by jury because it had no power under the law to impanel a jury, and was therefore so constructed as to give the defendant a legal trial. *U. S. v. Herzog*, (1892) 20 D. C. 431.

VII. "WHERE THE SAID CRIMES SHALL HAVE BEEN COMMITTED" — 1. In General. — An indictment cannot be found in one state of the Union for an offense committed in another; it is forbidden by the clause. And as there can be no original indictment for such crime, so there can be no original complaint. In the case of one charged with crime in another state the proper course to take is for the complaint to be made in the state in which the crime is alleged to have been committed, and then to make demand for the accused, and his arrest and removal under section 1014, R. S., may be obtained.

In re Rosdeitscher, (1888) 33 Fed. Rep. 657. See section 1014, R. S., under title *Crimes and Offenses*, 2 FED. STAT. ANNOT. 321.

Crimes committed against the laws of the United States out of the limits of a state are not local, but may be tried at such place as Congress shall designate by law, but are local if committed within the state. They must then be tried in the district in which the offense was committed, according to the Sixth Amendment. *U. S. v. Jackalow*, (1861) 1 Black (U. S.) 486.

Sending non-mailable matter through the mail. — Section 3894, R. S., as amended, pro-

viding in part that "any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed," must be construed in connection with this clause and the Sixth Amendment, and the clause that permits a person accused of crime to be prosecuted and tried for the offense of which he is charged, in a court held in a state and district other than the state

and district in which the crime was committed, should not be enforced. *U. S. v. Conrad*, (1894) 59 Fed. Rep. 458. See section 3894, R. S., under title *Postal Service*, 5 FED. STAT. ANNOT. 846.

Locality in insurrection and courts closed.

— By this clause, treason or other crime committed within the limits of the United States can be tried only within the state and judicial district within which it was committed; and the accused has the right to a trial by jury in such state and district. If, therefore, treason has been committed at

Charleston or at New Orleans, it can be tried only by a jury in South Carolina or Louisiana. And if the condition of either of those states be such that the judicial tribunals of the United States cannot or will not perform their functions, crimes there committed, however atrocious, cannot be punished by the regular administration of justice. Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273. See also Charge of Grand Jury, (1863) 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274; Charge of Grand Jury, (1861) 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277.

2. Boundary of State a Question of Fact. — The boundary of a state, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury.

U. S. v. Jackalow, (1861) 1 Black (U. S.) 487.

VIII. AT SUCH PLACE AS CONGRESS MAY DIRECT. — The words “the trial shall be at such place or places as the Congress may by law have directed” impose no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and must occur at any place which shall have been designated by Congress previous to the trial.

Cook v. U. S., (1891) 138 U. S. 182.

The First Crimes Act, passed April 30, 1790, ch. 9, § 8, 1 Stat. L. 114, provided that “trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where

the offender is apprehended, or into which he may first be brought.” See section 730, R. S., title *Crimes and Offenses*, 2 FED. STAT. ANNOT. 345, and *U. S. v. Dawson*, (1853) 15 How. (U. S.) 488, and *Jones v. U. S.*, (1890) 137 U. S. 211.

ARTICLE III., SECTION 3.

"Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted."

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I. POWER OF CONGRESS LIMITED.—No other acts than those defined in the Constitution can be declared to constitute the offense. Congress can neither extend, nor restrict, nor define the crime. Its power over the subject is limited to prescribing the punishment.

U. S. v. Greathouse, (1863) 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254.

"The resentment so naturally enkindled against those who are supposed to aim at the

destruction of the only security which we enjoy for life, liberty, and estate, leads us frequently to include, under this high crime, offenses greatly inferior in turpitude, much less dangerous in their effects, and in every

respect of a different description and tendency. To prevent, therefore, as far as possible every abuse by the extension of treason to offenses which in time of public agitation might, by violent or corrupt constructions, be pretended to belong to it, there was inserted in our national compact a rule which was to be binding on every department of government. To define and provide punishments for other crimes of federal cognizance is left to Congress; but with a jealousy on this subject, which a full knowledge of the excesses that had so often been committed in other countries by parties contending for dominion was well calculated to excite, no other trust was here reposed in the legislature than that of prescribing in what way treason was to be punished. For its definition resort was ever to be had to that great fundamental law, which was to be binding at all times, and was not liable to be changed on a sudden emergency so as to gratify the vengeance or promote the views of aspiring or designing men." *U. S. v. Hoxie*, (1808) 1 *Paine* (U. S.) 265, 26 *Fed. Cas. No. 15*, 407.

Congress cannot place among the inferior class of offenses the crime declared in the Constitution to be treason, but can only prescribe the punishment for treason, regulate the trial, and direct the mode in which that punishment is to be executed. *U. S. v. Fries*, (1799) 3 *Dall.* (U. S.) 515, 9 *Fed. Cas. No. 5*, 126.

Federalist. — As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author. *Madison*, in *The Federalist*, No. XLII.

II. CONSTITUTIONAL DEFINITION OF TREASON — 1. Statutory Origin of Definition. — The two species of treason mentioned in the Constitution are described in it in language borrowed from that of the English statute of treasons.

U. S. v. Greiner, (1861) 4 *Phila.* (Pa.) 396, 18 *Leg. Int.* (Pa.) 149, 26 *Fed. Cas. No. 15*, 262, wherein the court said that the phrase "levying war" is therefore understood and applied in the United States in the sense in which it had been used in England.

The term "levying war," having been adopted by our Constitution, must be understood in that sense in which it was universally received in this country when the Constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term. *U. S. v. Burr*, (1807) 25 *Fed. Cas. No. 14*, 693.

This definition was taken from the statute of 25 *Edw. III.*, of England, and which had been several times reaffirmed, for the purpose of correcting abuses that had grown up in that kingdom in respect to the law, both by

Acts of Parliament and the decisions of courts, under the tyrannical reigns of the Tudors and the Stuarts. Those abuses were well known to the founders of our government, and doubtless led to the peculiar phraseology observable in the definition of the crime, namely, that it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and to the other equally stringent feature, that no person shall be convicted of the offense except on the testimony of two witnesses to the same overt act. The first prohibits Congress from making any other acts of the citizen than those specified, treason; and the second prevents the introduction of constructive treasons, which had been engrafted upon this statute of *Edw. III.* by judicial decisions. *Law of Treason*, (1861) 5 *Blatchf.* (U. S.) 549, 30 *Fed. Cas. No. 18*, 271. See also *Druecker v. Salomon*, (1867) 21 *Wis.* 626.

2. Levying War — a. MUST BE AN ACTUAL ASSEMBLY FOR TREASONABLE PURPOSE. — There must be an actual assembly for the purpose of effecting a treasonable purpose, to constitute a levying of war.

Ex p. Bollman, (1807) 4 *Cranch* (U. S.) 126, discharging on a writ of habeas corpus parties who had been committed on a charge of treason in the case of *U. S. v. Bollman*, (1807) 1 *Cranch* (C. C.) 373, 24 *Fed. Cas. No. 14*, 622.

To constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted.

They levy war who create or carry on war. The offense is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws. *U. S. v. Greathouse*, (1863) 4 *Sawyer* (U. S.) 457, 26 *Fed. Cas. No. 15*, 254.

To constitute an actual levy of war there must be an assembly of persons, met for the treasonable purpose, and some overt act done,

or some attempt made by them with force to execute or towards executing that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. Law of Treason, (1842) 1 Story (U. S.) 614, 30 Fed. Cas. No. 18,275.

If the purpose be entirely to overthrow the government at any one place, by force, that is a treasonable purpose. Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273. See also Charge of Grand

Jury, (1863) 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274.

Military array unnecessary.—Although there must be force used, it is not necessary that there should be any military array or weapons. *Druecker v. Salomon*, (1867) 21 Wis. 626.

Though no actual violence committed.—Where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war though no actual violence may be committed. *U. S. v. Burr*, (1807) 25 Fed. Cas. No. 14,693.

Instigating Treason.—Successfully to instigate treason is to commit it.

Charge to Grand Jury, (1851) 2 Wall. Jr. (C. C.) 134, 30 Fed. Cas. No. 18,276.

b. OPPOSING EXECUTION OF PUBLIC LAW BY FORCE — (1) *In General.*—

It is treason "in levying war against the United States" for persons who have none but a common interest with their fellow citizens, to oppose or prevent, by force, numbers, or intimidation, a public and general law of the United States, with intent to prevent its operation or compel its repeal. Force is necessary to complete the crime; but the quantum of force is immaterial.

U. S. v. Fries, (1799) 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5,126.

The expression "levying war" so regarded embraces not merely that act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the Constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. Charge to Grand Jury, (1851) 2 Wall. Jr. (C. C.) 134, 30 Fed. Cas. No. 18,276.

Persons engaged in forcibly opposing the

execution of a draft commit the crime of treason. *Druecker v. Salomon*, (1867) 21 Wis. 626.

The treasonable design need not be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Law of Treason, (1842) 1 Story (U. S.) 614, 30 Fed. Cas. No. 18,275.

(2) *Intent to Suppress Office and Compel Resignation of Officer.*—The commission of acts of violence by a number of persons, with the intention to suppress an office of excise and to compel the resignation of the excise officer, so as to render an Act of Congress, in effect, null and void, constitutes the crime of high treason in the contemplation of the Constitution and law of the United States.

U. S. v. Vigol, (1795) 2 Dall. (U. S.) 346, 28 Fed. Cas. No. 16,621.

An insurrection, whose object is to suppress the excise officers, and to prevent the

execution of an Act of Congress by force and intimidation, is high treason. *U. S. v. Mitchell*, (1795) 2 Dall. (U. S.) 348, 28 Fed. Cas. No. 15,788.

(3) *Effort to Defeat Execution of Law in Particular Instance.*—If the object be to prevent by force the execution of any public law of the United States, generally and in all cases, that is a treasonable purpose, for it is entirely to overthrow the government as to one of its laws. And if there be such an assemblage for the purpose of carrying such an intention into effect by force, it will constitute levying war. But the sudden outbreak of a mob, or the assembling of men in order, by force, to defeat the execution of the law, in a

particular instance, and then to disperse, without the intention to continue together, or to reassemble for the purpose of defeating the law generally, in all cases, is not levying war.

Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273. See also Charge of Grand Jury, (1863) 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274.

(4) *Object of a Local and Private Nature.* — When the object of an insurrection is of a local or private nature, not having a direct tendency to destroy all property and all government by numbers and armed force, it will not amount to treason; and in these and other cases that occur, the true criterion is the intention with which the parties assembled.

U. S. v. Hoxie, (1808) 1 Paine (U. S.) 265, 26 Fed. Cas. No. 15,407.

the United States, accompanied with any degree of force, if for a private purpose, is not treason. U. S. v. Hanway, (1851) 2 Wall. Jr. (C. C.) 139, 26 Fed. Cas. No. 15,299.

The resistance of the execution of a law of

c. OCCUPATION AND DETENTION OF FORTRESS AGAINST THE GOVERNMENT. — The occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, either in the occupation or in the detention of the post.

U. S. v. Greiner, (1861) 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

d. LEVYING WAR AGAINST A PARTICULAR STATE — There must, to constitute the crime, be a levying of war against the United States in their sovereign character, and not merely a levying of war exclusively against the sovereignty of a particular state.

Law of Treason, (1842) 1 Story (U. S.) 614, 30 Fed. Cas. No. 18,275, wherein the court said: "If the object of an assembly of persons, met with force, is to overturn the government or constitution of a state, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that state with the national government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treason-

able purpose is treason against the state, and against the state only. It is in no just sense a levying of war against the United States. But treason may be begun against a state, and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the government of the state, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the state, that would be treason against the United States."

e. CONSPIRACY TO LEVY WAR. — To constitute the specific crime of treason, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design.

Ex p. Bollman, (1807) 4 Cranch (U. S.) 126, discharging on a writ of habeas corpus parties who had been committed on a charge of treason in the case of U. S. v. Bollman,

(1807) 1 Cranch (C. C.) 373, 24 Fed. Cas. No. 14,622. See also Law of Treason, (1861) 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270; Law of Treason, (1861) 5 Blatchf.

(U. S.) 549, 30 Fed. Cas. No. 18,271; Law of Treason, (1842) 1 Story (U. S.) 614, 30 Fed. Cas. No. 18,275.

A mere conspiracy to overthrow the government, however atrocious such conspiracy may be, does not of itself amount to the crime of treason. Thus, if a convention, legislature, junta, or other assemblage, entertain the purpose of subverting the govern-

ment, and to that end pass acts, resolves, ordinances, or decrees, even with the view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war. Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273. See also Charge of Grand Jury, (1863) 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274.

3. Giving Aid and Comfort to Enemies — a. WHO ARE ENEMIES. — The term "enemies," as used in the second clause, according to its settled meaning at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government. An enemy is always the subject of a foreign power who owes no allegiance to our government or country.

U. S. v. Greathouse, (1863) 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254.

b. WHAT CONSTITUTES GIVING AID AND COMFORT. — What constitutes the overt act, under the clause "adhering to their enemies, giving them aid and comfort," must depend very much upon the facts and circumstances of each particular case. There are some acts of the citizen, in his relations with the enemy, which leave no room for doubt, such as giving intelligence with intent to aid him in his acts of hostility, sending him provisions or money, furnishing arms, or troops, or munitions of war; surrendering a military post, etc., — all with a like intent. These and kindred acts are overt acts of treason by adhering to the enemy.

Law of Treason, (1861) 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271.

Sale of goods to enemy's agent. — "He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be per-

mitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." Hanauer v. Doane, (1870) 12 Wall. (U. S.) 347.

c. DELIVERING UP PRISONERS AND DESERTERS. — Delivering up prisoners and deserters to an enemy is treason, and nothing but a well-grounded fear of life will excuse the act.

U. S. v. Hodges, (U. S. Circ. Ct. 1815) 2 Wheel. Crim. (N. Y.) 477, 26 Fed. Cas. No. 15,374.

4. Words Oral, Written, or Printed. — Words oral, written, or printed, however treasonable, seditious, or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime. When spoken, written, or printed in relation to an act or acts which if committed with a treasonable design might constitute such overt act, they are admissible as evidence tending to characterize it, and to show the intent with which the act was committed. They may also furnish some evidence of the act itself against the accused. This is the extent to which such publications may be used, either in finding a bill of indictment or on the trial of it.

Law of Treason, (1861) 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271.

5. Constructive Treasons. — The provision that no person shall be convicted of the offense except on the testimony of two witnesses to the same overt act prevents the introduction of constructive treasons which had been engrafted upon the English statute by judicial decisions.

Law of Treason, (1861) 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271. See *U. S. v. Burr*, (1807) 25 Fed. Cas. No. 14,693.

"Many of the English cases, then considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to

be, that the term 'levying war' should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies." *U. S. v. Hanway*, (1851) 2 Wall. Jt. (C. C.) 139, 26 Fed. Cas. No. 15,299.

III. WHO MAY BE GUILTY OF TREASON — 1. Those Who Perform Any Part.

— If war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.

Ex p. Bollman, (1807) 4 Cranch (U. S.) 126, discharging on a writ of habeas corpus parties who had been committed on a charge of treason in the case of *U. S. v. Bollman*, (1807) 1 Cranch (C. C.) 373, 24 Fed. Cas. No. 14,622. See also Law of Treason, (1861) 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270; Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273.

Those who perform a part in the prosecution of the war may correctly be said to levy war and to commit treason under the Constitution. *U. S. v. Burr*, (1807) 25 Fed. Cas. No. 14,693.

However remote from the scene of action. — If war is actually declared levied, all those who perform any part, however minute, or however remote from the scene of action, and

who are actually leagued in the general conspiracy, are to be considered as traitors. Such part may be performed, not only by giving information or other direct aid to the rebels, but also by acts which tend and are designed to defeat, obstruct, or weaken our own arms. Charge of Grand Jury, (1861) 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277. See also *U. S. v. Burr*, (1807) 25 Fed. Cas. No. 14,693; *Druecker v. Salomon*, (1867) 21 Wis. 626.

Treason may be committed at places remote from the seat of the rebellion, by co-operating with the rebels and sending them arms or intelligence, or intentionally rendering other assistance, and the trial of such offense will be had in the state and district where committed. Charge of Grand Jury, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18,273.

2. Domiciled Aliens. — An alien, whilst domiciled in the United States, owes a local and temporary allegiance, which continues during the period of his residence, and he is amenable to the laws of the United States prescribing punishment for treason and for giving aid and comfort to rebellion.

Carlisle v. U. S., (1872) 16 Wall. (U. S.) 154. See *Green's Case*, (1872) 8 Ct. Cl. 412.

Treason is a Breach of Allegiance, and can be committed by him who owes allegiance either perpetual or temporary.

U. S. v. Wiltberger, (1820) 5 Wheat. (U. S.) 97. See also Charge to Grand Jury, (1851) 2 Wall. Jr. (C. C.) 134, 30 Fed. Cas. No. 18,276.

3. Status of Adherents to Confederate Government. — The Confederate government was never acknowledged by the United States as a *de facto* government in the sense that adherents to it in war against the government *de jure* did not incur the penalties of treason. From a very early period of the civil war to

its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

Thorington v. Smith, (1868) 8 Wall. (U. S.) 1. See also *Sprott v. U. S.*, (1874) 20 Wall. (U. S.) 464.

IV. ACCESSORIES. — In treason there are no accessories; all who engage in the rebellion at any stage of its existence, or who designedly give it any species of aid and comfort, in whatever part of the country they may be, stand on the same platform; they are all principals in the commission of the crime; they are all levying war against the United States.

U. S. v. Greathouse, (1863) 4 Sawy. (U. S.) 457, 26 Fed. Cas. No. 15,254. See also *Fries's Case*, (1800) 9 Fed. Cas. No. 5,127.

V. EVIDENCE REQUIRED BY THE CONSTITUTION — 1. No Application to Preliminary Examinations or Proceedings Before Grand Juries. — The provisions of the Constitution relating to the evidence necessary to convict of treason apply only to the trial of indictments, and are inapplicable to proceedings before grand juries, or to preliminary examinations.

U. S. v. Greiner, (1861) 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262, wherein the court said: "This appears to have been the opinion of Chief Justice Marshall (1 Burr Tr. 196), and likewise of my judicial predecessor in this district (*Charge to Grand Jury*, (1851) 2 Wall. Jr. (C. C.) 138). Judge Iredell had, indeed, been previously of a different opinion. 1 Whart. State Tr. 480. His impression had probably been derived from the opinions which, under the statutes 1 Edw. VI., c. 12, sec. 22; 5 Edw. VI., c. 11, sec. 11; and 7 Wm. III., c. 3, had prevailed in England. See *Fenwick's Case*, 13 How. St. Tr. 537, and *Maclean's Case*, 26 How. St. Tr. 731. As the point has never been directly decided in the United States, it may not be amiss to mention a difference between the language of

the English statutes and the words of the Constitution. Those statutes enacted that no person should be indicted or convicted of treason, unless, etc. The Constitution, omitting the word 'indicted,' uses the single word 'convicted.' The difference in language, to which the attention of Chief Justice Marshall was doubtless directed, though he does not mention it, seems to be decisive of the question. The intention of the framers of the Constitution must have been to restrain the application of the prescribed rule of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial."

2. Testimony of Two Witnesses to Overt Act. — Of the overt act of treason there must be proof by two witnesses, and if there be testimony by four witnesses that the defendant was at a certain place, at a great distance from his home, and that he was armed, that the conspiracy was formed at that place, and that the defendant was actually passed on the march to the place where the treasonable acts were to be carried out, the evidence is sufficient, even if there be testimony of only one witness as to his actual presence at the place of attack.

U. S. v. Mitchell, (1795) 2 Dall. (U. S.) 348, 26 Fed. Cas. No. 15,788.

3. Confession in Open Court. — When a confession is made out of court it is not itself sufficient to convict although proved by two witnesses.

U. S. v. Fries, (1799) 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5,126.

Admissions made voluntarily by an accused person after his arrest are not confessions contemplated by the Constitution.

and, upon the trial of an indictment, would not, in connection with the testimony of a single witness to the overt act, suffice to warrant a conviction. *U. S. v. Greiner*, (1861) 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

4. Proof of Intent. — The Intent May Be Proved by one witness, collected from circumstances, or even by a single fact.

U. S. v. Fries, (1799) 3 Dall. (U. S.) 515, 9 Fed. Cas. No. 5,126.

A Declaration by One Accused Accompanying the Overt Act laid in the indictment may be given in evidence to show the intent with which the act was done.

U. S. v. Lee, (1814) 2 Cranch (C. C.) 104, 26 Fed. Cas. No. 15,584. See also U. S. v. Fries, (1799) 3 Dall. (U. S.) 515, 9 Fed.

Cas. No. 5,126, that the confession of the prisoner may be given in evidence as corroboratory proof of the intent.

VI. PUNISHMENT PRESCRIBED BY THE CONSTITUTION. — What was intended by the constitutional provision is free from doubt. In England attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attained, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attained.

Wallach v. Van Riswick, (1875) 92 U. S. 202. See also *supra*, under *Power of Congress limited*, p. 133.

Concurrently with the passage of the Confiscation Act of July 17, 1862, Congress also adopted a joint resolution explanatory of it, whereby it was resolved that no punishment or proceedings under the Act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life. It is a well-known fact in our political history that this resolution was adopted in consequence of doubts which the President entertained respecting the power of Congress to prescribe a forfeiture of longer duration than the life of the offender. Be this as it may, the Act and the resolution are to be construed together, and they admit of no doubt that all which could, under the law, become the property of the United States, or could be sold by virtue of a decree of condemnation and order of sale, was a right to the property seized, terminating with the life of the person for whose act it had been seized. *Bigelow v. Forrest*, (1869) 9 Wall. (U. S.) 350.

Forfeitures for violation of revenue law. —

An Act of Congress declaring a forfeiture of real property employed in carrying on business in violation of the revenue law, is not a violation of the clause prohibiting forfeiture of real estate, even for punishment of treason, except for life. This clause and the clause of section 9, Article I., prohibiting the passing of a bill of attainder, have "respect to high crimes, and punishment of them, restraining rigor, and guarding against arbitrarily enacting guilt. The case before the court is a civil suit *in rem*, against the thing, to ratify the seizure of it, and the provision of the Act of Congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy, framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for Congress, in the exercise of its legislative power, to determine." U. S. v. West Front St. Distillery, (1870) 2 Abb. (U. S.) 192, 25 Fed. Cas. No. 14,965.

VII. JURISDICTION OF STATE COURTS. — The jurisdiction of the state courts does not extend to the offense of treason against the United States.

People v. Lynch, (1814) 11 Johns. (N. Y.) 553.

ARTICLE IV., SECTION 1.

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

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I. TO THE PUBLIC ACTS AND RECORDS — 1. In General. — This constitutional requirement implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home.

Chicago, etc., *R. Co. v. Wiggins Ferry Co.*, (1887) 119 U. S. 622.

2. No Reference to Conduct of Individuals or Corporations. — Even if it be assumed that the word "acts" includes "statutes," the clause has nothing to do with the conduct of individuals or corporations.

Minnesota *v. Northern Securities Co.*, (1904) 194 U. S. 72.

3. Construction of Statute of Another State. — The mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full faith and credit demanded by the statute in order to give the federal courts jurisdiction.

Allen v. Alleghany Co., (1905) 196 U. S. 465. See also *Johnson v. New York L. Ins. Co.*, (1903) 187 U. S. 495.

4. Contract Not Controlled by Law of Another State. — If a contract cannot be regarded as controlled by the law of another state, there is no foundation for the contention that full faith and credit were not given to the public acts and records of that state.

National Mut. Bldg., etc., *Assoc. v. Brahan*, (1904) 193 U. S. 647.

5. Taxation of State Debt. — The registered public debt of one state, exempt from taxation by the debtor state, is taxable by another state when owned by a resident of the latter state. No state can legislate except with reference to its own jurisdiction.

Bonaparte v. Tax Ct., (1881) 104 U. S. 594.

II. TO JUDICIAL PROCEEDINGS — 1. Effect of Proceedings of United States Courts.

— The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction.

Embry v. Palmer, (1882) 107 U. S. 9, wherein the court further said: "That the Supreme Court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the states, wherever rendered and wherever sought to be enforced."

Territorial courts.— That the judgments of territorial courts are to be given full faith and credit, see *Suessenbach v. Wagner*, (1889) 41 Minn. 108. But see *Seton v. Hanham*, (1832) R. M. Charl. (Ga.) 374.

Courts of Indian nations.— That the judgments of the courts of an Indian nation are entitled to the same respect and to the same faith and credit as the judgments of the territorial courts of the United States, see *Cornells v. Shannon*, (C. C. A. 1894) 63 Fed. Rep. 305; *Exendine v. Pore*, (C. C. A. 1893) 56 Fed. Rep. 777; *Mehlin v. Ice*, (C. C. A. 1893) 56 Fed. Rep. 12.

2. Faith and Credit to Be Given by United States Courts.— The courts of the United States are bound to give the judgments of the state courts the same faith and credit that the courts of one state are bound to give the judgments of the courts of her sister states.

Cooper v. Newell, (1899) 173 U. S. 567. See also *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 291; *Galpin v. Page*, (1874) 3 Sawy. (U. S.) 93, 9 Fed. Cas. No. 5,206.

3. Protection of Clause Must Be Claimed.— The claim of the protection of the full faith and credit clause is without merit when nowhere in its petition for interpleader or in the proceedings had thereunder in the state courts did the intervener set up rights specifically based on a foreign state judgment, claim for that judgment an effect which, if denied to it, would have impaired its force and effect, nor predicate any right to the relief demanded upon the effect due to the foreign state judgment.

Wabash R. Co. v. Flannigan, (1904) 192 U. S. 37.

By defending on the merits, after pleading and relying upon a foreign judgment, a

party does not waive the benefits of an alleged estoppel arising from the foreign judgment. *Harding v. Harding*, (1905) 198 U. S. 330.

4. No Reference to Enforcement of Fines, Penalties, and Forfeitures.— This provision confers no new jurisdiction on the courts of any state, and therefore does not authorize them to take jurisdiction of a suit or prosecution of such a penal nature that it cannot, on settled rules of public and international law, be entertained by the judiciary of any other state than that in which the penalty was incurred.

Huntington v. Attrill, (1892) 146 U. S. 685.

This clause does not relate to actions to recover penalties and fines, nor to actions authorized by statutes relating directly to

the collection of the revenues of a state, or the enforcement of fines, penalties, and forfeitures for noncompliance with, or violations of, such statute. *Arkansas v. Bowen*, (1891) 20 D. C. 296.

5. Burden of Establishing Violation of Right. — The burden is upon the party asserting it to establish the failure of a court to give to decrees of a federal court and the court of another state the due effect to which they are entitled.

Commercial Pub. Co. v. Beckwith, (1903) 188 U. S. 573.

6. Effect of Foreign Judgment — a. EFFECT DECLARED BY ACT OF CONGRESS. — Congress has power to declare what shall be the effect of a judgment of a state court in another state.

M'Elmoyle v. Cohen, (1839) 13 Pet. (U. S.) 326, wherein the court said: "Though a judgment obtained in the court of a state is not to be regarded in the courts of her sister states as a foreign judgment, or as merely *prima facie* evidence of a debt to sustain an action upon the judgment, it is to be considered only distinguishable from a foreign judgment in this, that by the first section of the fourth article of the Constitution, and by the Act of May 26, 1790, section 1, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the Act of Congress has prescribed. It must be obvious, when the Constitution declared that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and provides that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another state. The authenticity of a judgment and its effect depend upon the law made in pursuance of the Constitution; the faith and credit due to it as the judicial proceeding of a state is given by the Constitution, independently of all legislation." M'Elmoyle v. Cohen, (1839) 13 Pet. (U. S.) 324. See Warren Mfg. Co. v. Etna Ins. Co., 2 Paine (U. S.) 501, 29 Fed. Cas. No. 17,206.

"The legislation of Congress amounts to this: that the judgment of another state shall be record evidence of the demand, and that the defendant, when sued on the judgment, cannot go behind it and controvert the contract, or other cause of action, on

which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties to it. This is the whole extent to which Congress has gone. As to what further "effect" Congress may give to judgments rendered in one state and sued on in another does not belong to this inquiry; we have to deal with the law as we find it, and not with the extent of power Congress may have to legislate further in this respect. That the legislation of Congress, so far as it has gone, does not prevent a state from passing acts of limitation to bar suits on judgments rendered in another state, is the settled doctrine of this court. It was established, on mature consideration, in the case of M'Elmoyle v. Cohen, (1839) 13 Pet. (U. S.) 312, and to the reasons given in support of this conclusion we refer." Alabama State Bank v. Dalton, (1850) 9 How. (U. S.) 528.

The effect to be given to a foreign judgment is defined and declared by the Act of Congress aforesaid as the framers of the Constitution contemplated that it should be, and whenever the question arises whether due force and effect has been given to a foreign judgment or decree, the decision of the case does not involve a constitutional question, but depends, rather, upon the proper interpretation of an Act of Congress. If Congress had not seen fit to legislate concerning the effect to be given in the several states to the judgments of sister states, it would, doubtless, be true that, whenever the effect of a foreign judgment was drawn in question, it would give rise to the inquiry whether such full faith and credit had been accorded to it as the Constitution requires. Merritt v. American Steel Barge Co., (C. C. A. 1896) 75 Fed. Rep. 815.

b. RULE OF EVIDENCE AND NOT RULE OF JURISDICTION. — This clause and the Act of Congress passed thereunder establish a rule of evidence rather than of jurisdiction. While they make the record of a judgment rendered after due notice in one state conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable

for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

Wisconsin v. Pelican Ins. Co., (1888) 127 U. S. 291. See also *Anglo-American Provision Co. v. Davis Provision Co. No. 1*, (1903) 191 U. S. 374; *McElmoyle v. Cohen*, (1839)

13 Pet. (U. S.) 325; *Clifford v. Williams*, (1904) 131 Fed. Rep. 105; *Israel v. Israel*, (1904) 130 Fed. Rep. 237; *Clafin v. McDermott*, (1882) 12 Fed. Rep. 376.

Prescribes Rule Courts Are to Be Guided By. — The full faith and credit clause only prescribes a rule by which courts, federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the court is sitting.

Minnesota v. Northern Securities Co., (1904) 194 U. S. 72.

C. SAME EFFECT AS IN STATE IN WHICH RENDERED. — A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another state, as it has in the state in which it was rendered.

Hanley v. Donoghue, (1885) 116 U. S. 3. See also *Hampton v. McConnel*, (1818) 3 Wheat. (U. S.) 235; *Allison v. Chapman*, (1884) 19 Fed. Rep. 488; *Randolph v. King*, (1867) 2 Bond (U. S.) 104, 20 Fed. Cas. No. 11,560; *Banks v. Greenleaf*, (1799) 1 Hughes (U. S.) 261, 2 Fed. Cas. No. 959.

This provision, and the Act of Congress passed thereunder, give the decree of a state court the same effect elsewhere which it has in that state. *Cheever v. Wilson*, (1869) 9 Wall. (U. S.) 133.

Priority of attachment over unrecorded chattel mortgage. — A debtor residing in the state of New York executed to another resident of that state, to secure an existing debt, a chattel mortgage on property in the state of Illinois. Two days thereafter another creditor sued out of the proper court of Illinois a writ of attachment, caused it to be levied on the property covered by the chattel mortgage, got judgment in the attachment suit, and had the property sold in satisfaction of his debt. By statutes of Illinois any creditor can sue out a writ of attachment against a nonresident debtor. Under this writ the officer takes possession

of the debtor's property. If the debtor cannot be served with process, he receives notice by publication, and if he does not appear the creditor, on proving his case, has judgment by default, and execution is issued to sell the property attached. These statutes further enact that mortgages of personal property are void as against third persons unless acknowledged and recorded, and unless the property be delivered to and remain with the mortgagee. The mortgage creditor sued the attachment creditor in the courts of New York for taking and converting the property sold, as already mentioned under the attachment. The attachment creditor pleaded in bar the attachment proceedings in Illinois, but the New York court held that the law of New York was to govern the cause, not the law of Illinois, though the property was situated there, and that by the law of New York the title to the property passed on delivery and execution of the mortgage, and took precedence of the subsequent attachment in Illinois. It was held that the New York court failed to give to the judicial proceedings of the state of Illinois the full faith and credit to which they were entitled under this provision. *Green v. Van Buskirk*, (1868) 7 Wall. (U. S.) 140.

No Greater Effect can be given to any judgment of a court of one state in another state than is given to it in the state where rendered; that is to say, as to whether a judgment is a final or an interlocutory one.

Board of Public Works v. Columbia College, (1873) 17 Wall. (U. S.) 521.

"The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several states does not require that they shall have any greater force and efficacy in other courts than in the courts

of the states from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle, and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject." *Robertson v. Pickrell*, (1883) 109 U. S. 610.

d. CONCLUSIVE ON THE MERITS. — When duly pleaded and proved, judgments of other states have the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated.

Huntington v. Attrill, (1892) 146 U. S. 685.

"Judgments rendered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country only in respect to their conclusiveness upon the merits if rendered by a court having jurisdiction over the parties and the cause of action, and this difference is wholly due to the constitutional and legislative provision already cited." Union, etc., Bank v. Memphis, (C. C. A. 1901) 111 Fed. Rep. 561.

The Constitution contemplates a power in Congress to give a conclusive effect to such judgments. Mills v. Duryee, (1813) 7 Cranch (U. S.) 485.

"The effect of these provisions of the Constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several states, but also

in the Circuit Courts of the United States, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Washington holding that judgments of the courts of a state had the same effect throughout the Union as within that state, but Chief Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. Armstrong v. Carson, (1795) 2 Dall. (U. S.) 302; Green v. Sarmiento, (1811) 3 Wash. (U. S.) 17, 21 (1810) Pet. (C. C.) 74, 78; Peck v. Williamson, (1813) 1 Law Repos. (4 N. Car.) 53. The decisions of this court have clearly recognized that judgments of a foreign state are *prima facie* evidence only, and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect." Hilton v. Guyot, (1895) 159 U. S. 182.

A Plea of *Nil Debent* to an action brought on a judgment obtained in a state court of another state is inadmissible, for, whatever doubts there might be on the words of the Constitution, the Act of Congress effectually removes them, declaring in direct terms that the record shall have the same effect in the federal court as in the court from which it was taken.

Armstrong v. Carson, (1795) 2 Dall. (U. S.) 303.

e. BETWEEN SAME PARTIES AND PRIVIES. — A judgment against the administrator of an estate is not evidence of its sufficiency to entitle the judgment creditor to recover against an administrator of the same estate in another state. Under the Act of Congress passed to put into effect its constitutional provisions, it is necessary that the suit be between the same parties or privies, and on the same subject-matter, where the proceeding is *in rem*, but the parties above are not the same, nor are the privies. The administrator under grant of administration in one state stands in no relation of privity to the administrator in another. Each is privy to the testator and would be estopped by a judgment against him; but they have no privity with each other in law or in estate. Such a judgment is not *in rem*, but *in personam*. The judgment is against the person of the administrator that he shall pay the debt of the testator out of the funds committed to his care. If there be another administrator in another state liable to pay the same debt he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger.

Stacy v. Thrasher, (1848) 6 How. (U. S.) 58. See also McLean v. Meek, (1855) 18 How. (U. S.) 18.

f. FOLLOWING JUDGMENTS AS PRECEDENTS. — This clause relates only to the conclusiveness of such judgments as between the parties to them and their privies. It does not require that judgments in one state shall be followed by

the courts of other states as matter of authority in other similar cases. The Constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one state to follow those of another upon any question, whether upon the construction of local statutes or otherwise.

Wiggins' Ferry Co. v. Chicago, etc., R. Co., (1882) 11 Fed. Rep. 383, *affirmed* *Chicago, etc., R. Co. v. Wiggins' Ferry Co.*, (1883) 108 U. S. 18.

alleged error in a decree of a state court asserted to be in collision with a prior decision of the same court in the same case. *Mitchell v. Lenox*, (1840) 14 Pet. (U. S.) 49.

This clause cannot be held to embrace an

g. JUDGMENT AGAINST CORPORATION BINDS STOCKHOLDER. — A plaintiff, after the recovery of a judgment against a Kansas corporation in the courts of Kansas, and the return of an execution unsatisfied, may maintain an action in any court of competent jurisdiction against a stockholder of the corporation to recover in satisfaction of his judgment an amount not exceeding the par value of the defendant's stock, and in that state the judgment is not only conclusive against the corporation but also binding upon the stockholder. And in such an action brought against the stockholder in the courts of Rhode Island, the only question to be determined is, not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered; the only defenses which he can make against it are those which he can make in the courts of Kansas.

Hancock Nat. Bank v. Farnum, (1900) 176 U. S. 640.

See *infra*, p. 153, *Statute of Limitations — May Be Pleaded by Stockholder to an Order for Assessment.*

h. HOW EFFECT OF JUDGMENT ASCERTAINED. — Whenever it becomes necessary under this requirement of the Constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon.

Chicago, etc., R. Co. v. Wiggins' Ferry Co., (1887) 119 U. S. 622.

plicable to the subject. *Hanley v. Donoghue*, (1885) 116 U. S. 1.

Regulated by general rules of pleading and evidence. — As Congress has not undertaken to prescribe in what manner the effect that judgments have in the courts of the state in which they are rendered shall be ascertained, it has left that to be regulated by the general rules of pleading and evidence ap-

Where by the local law of a state its highest courts take judicial notice of the laws of other states, the Supreme Court of the United States, on writ of error, might take judicial notice of them. *Hanley v. Donoghue*, (1885) 116 U. S. 1.

i. NO PRIORITY, PRIVILEGE, OR LIEN. — Foreign judgments enjoy, not the right of priority or privilege or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives them by its own laws, in their character of foreign judgments.

Cole v. Cunningham, (1890) 133 U. S. 112.

A judgment may have the "effect" of a lien upon all the lands of the defendant in the state where it is rendered, yet it cannot have

that effect on lands in another state by virtue of the faith and credit given to it by the Constitution and the Act of Congress passed thereunder. *Stacy v. Thrasher*, (1848) 6 How. (U. S.) 61.

j. NO EXECUTION WITHOUT NEW SUIT. — No execution can be issued upon judgments rendered in one state without a new suit in the tribunals of other states.

Cole v. Cunningham, (1890) 133 U. S. 112.

This provision does not put the judgments of other states upon the footing of domestic judgments, to be enforced by execution; but it leaves the manner in which they may be enforced to the law of the state in which they are sued on, pleaded, or offered in evidence. *Huntington v. Attrill*, (1892) 146 U. S. 685.

An execution issued on a judgment in the jurisdiction where it is rendered is not a judi-

cial determination of anything, and it is not an Act about which full faith and credit can be predicated. It has no effect except to create a lien upon the property of the defendant, and can have no effect in another jurisdiction. So that the language of the Constitution and the language of the Act of Congress can have no application to a mere execution issued upon a judgment in another state, as giving it any validity or credit elsewhere. *Waddill v. Cabell*, (1893) 21 D. C. 604.

k. AS FOUNDATION FOR A CREDITOR'S BILL. — A foreign judgment cannot be a foundation for a creditor's bill, but must be sued over before it becomes a judgment for the purpose of any remedy at law or in equity.

Claffin v. McDermott, (1882) 12 Fed. Rep. 376.

l. EFFECT OF DISCONTINUANCE OF SUIT IN ANOTHER STATE. — In permitting a party to show that an entry of discontinuance in a case in another state was not intended by the parties as a release and satisfaction of the cause of action, but was the result of a promissory agreement on the part of the defendant company which was never complied with, full faith and credit was not refused to the judgment in the other state. Such evidence was properly allowed, not to contradict the necessary legal import of that judgment, but to show the real meaning of the parties to that suit in agreeing upon its discontinuance.

Jacobs v. Marks, (1901) 182 U. S. 593.

7. Defenses That May Be Set Up in Suit on Foreign Judgment — **a. WANT OF JURISDICTION** — (1) *In General.* — This clause applies to the records and proceedings of courts only so far as they have jurisdiction. Wherever they want jurisdiction the records are not entitled to credit.

Board of Public Works v. Columbia College, (1873) 17 Wall. (U. S.) 528. See also *Andrews v. Andrews*, (1903) 188 U. S. 37; *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 291.

See also *infra*, p. 153, *Power of States to Legislate on Remedy—Statute of Limitations.*

Opinion of an attorney. — When a state court took jurisdiction and entered a final decree, evidence cannot be received in an action in another state of the opinion of an attorney practicing in the court in which the decree was rendered, that the court erred in thinking that jurisdiction was conferred upon that court, and that the decree sued on and offered in evidence was not binding. *Laing v. Rigney*, (1896) 160 U. S. 542.

(2) *Of the Parties or the Subject-matter.* — This provision gives no effect to the judgments of a court which had no jurisdiction of the subject-matter or of the parties.

Huntington v. Attrill, (1892) 146 U. S. 685. See also *Thormann v. Frame*, (1900) 176 U. S. 356; *Reynolds v. Stockton*, (1891) 140 U. S. 264; *Simmons v. Saul*, (1891) 138 U. S. 448.

This does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered to pronounce the judgment, nor into the rights of the state to exercise authority over the parties or the

subject-matter. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. *Cole v. Cunningham*, (1890) 133 U. S. 112.

Decree of Divorce Made in Another State. — A decree of divorce is entitled to no faith and credit when rendered in a state court which had no jurisdiction because neither party had a domicile in that state.

Bell v. Bell, (1901) 181 U. S. 175. See also *Streitwolf v. Streitwolf*, (1901) 181 U. S. 179.

A state court may collaterally impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. *German Sav., etc., Soc. v. Dormitzer*, (1904) 192 U. S. 128.

"As the state of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution,

and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicile by temporarily sojourning in another state, and there, without acquiring a *bona fide* domicile, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the state of Massachusetts against the public policy of that state as expressed in its statutes." *Andrews v. Andrews*, (1903) 188 U. S. 37.

(3) **Facts Necessary to Give Jurisdiction.** — The constitutional provision does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered, or into the facts necessary to give such jurisdiction.

Simmons v. Saul, (1891) 138 U. S. 448. See also *Thormann v. Frame*, (1900) 176 U. S. 356.

(4) **Record Not Conclusive.** — The jurisdiction of a court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the averments contained in the record of the judgment itself.

Thompson v. Whitman, (1873) 18 Wall. (U. S.) 457. See also the following cases: *United States*. — *German Sav., etc., Soc. v. Dormitzer*, (1904) 192 U. S. 128; *Grover, etc., Sewing Mach. Co. v. Radcliff*, (1890) 137

U. S. 294; *Henning v. Planters' Ins. Co.*, (1886) 28 Fed. Rep. 444; *Vermont*. — *Wood v. Augustins*, (1896) 70 Vt. 637.

(5) **Must Be Evidence of Want of Jurisdiction.** — If full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, the constitutional requirement would be enforced.

Rogers v. Alabama, (1904) 192 U. S. 231.

A defense to an action on a judgment rendered in another state must present facts

tending to impeach the jurisdiction of the court which rendered the judgment, either as to the subject-matter or the person. *L'Engle v. Gates*, (1896) 74 Fed. Rep. 513.

(6) **Service of Process** — (a) **Personal Service or Voluntary Appearance.** — When the subject-matter of a suit is merely the determination of the defendant's liability, it is necessary to the validity of the judgment, to require other states to give it full faith and credit, that it should appear from the record that the defendant had been brought within the jurisdiction of the court by personal service of

process, or his voluntary appearance, or that he had in some manner authorized the proceeding.

Grover, etc., *Sewing Mach. Co. v. Radcliffe*, (1890) 137 U. S. 287. See also *Barney v. De Kraft*, (1862) 6 D. C. 363; *American Tube, etc., Co. v. Crafts*, (1892) 156 Mass. 257; *Teel v. Yost*, (1891) 128 N. Y. 387; *Sammis v. Wightman*, (1893) 31 Fla. 10.

The Act of Congress enacted under this provision has been restricted in its application by a series of decisions of this court to judgments of state courts, when they had jurisdiction of the cause and of the parties; and in actions brought on such judgments

in other states, it has always been held that it was open to a defendant, whether sued alone or jointly with others, to show by plea and proof that he had not been served with process or had not voluntarily appeared. *Renaud v. Abbott*, (1886) 116 U. S. 287.

A judgment cannot be rendered against a nonresident where there is no personal service, except so far as the state rendering it has property within its borders to satisfy it by its own execution. *Henning v. Planters' Ins. Co.*, (1886) 28 Fed. Rep. 444.

(b) *Service on One of Two Defendants.* — Where there has been a joint judgment against two persons with service of process upon one only, such judgment is entitled to full faith and credit in other states as against the defendant upon whom process was served, if the judgment was valid against such defendant in the state in which judgment was given.

Renaud v. Abbott, (1886) 116 U. S. 288, wherein the court said: "The rule that exonerates a defendant actually served with process from the obligation of a judgment, because rendered also against another who has not been served, and therefore is not bound, is purely technical, and when by the local law, according to which such a judgment has been rendered, a different rule has

been established, which enforces the personal obligation of the defendant who has been served, or who has appeared in the action, the Act of Congress requires that the same effect shall be given to it in every other state in which it may be sued on, whatever may be the rule that there prevails in respect to its domestic judgments." See also *Hanley v. Donoghue*, (1885) 116 U. S. 1.

(c) *Service of Process While Temporarily in the State.* — Service of process was made on a person while in the state for the purpose of attending the taking of a deposition, according to notice, alleged to have been given for the purpose of enticing the defendant into the state. A judgment obtained on such service was entitled to full faith and credit in another state.

Jaster v. Currie, (1905) 198 U. S. 146, wherein the court said: "It will be observed that there was no misrepresentation, express or implied, with regard to anything, even the motives of the plaintiff. The parties were at arm's length. The plaintiff did not say or imply that he had one motive rather than another. He simply did a lawful act by all the powers enabling him to do it, and that was all. Therefore, the word 'fraud' may be discarded as inappropriate. The question is whether the service of a writ, otherwise lawful, becomes unlawful because the hope for a chance to make it was the sole motive for other acts tending to create

the chance, which other acts would themselves have been lawful but for that hope. We assume that motives may make a difference in liability. But the usual cases where they have been held to do so have been cases where the immediate and expected effect of the act done was to inflict damage, and where, therefore, as a matter of substantive law, if not of pleading, the act was thought to need a justification (see *Aikens v. Wisconsin*, (1904) 195 U. S. 194, 204), or else where the intent was to do a further and unlawful act to which the act done was the means (*Swift v. U. S.*, (1905) 196 U. S. 375, 396)."

(d) *Garnishment Process Against Resident Debtor of Nonresident Defendant.* — When a court acquired jurisdiction of a nonresident by trustee or garnishment process against a resident debtor of the nonresident defendant, a court of another state should give to the proceedings full faith and credit.

Chicago, etc., R. Co. v. Sturn, (1899) 174 U. S. 710. See also *King v. Cross*, (1899) 175 U. S. 399, *affirming Cross v. Brown*, (1895) 19 R. I. 220.

(e) *Service of Garnishment Process While Temporarily Within the State.* — If there be a law of a state providing for the attachment of a debt, then, if the garnishee be

found in that state, and process be personally served upon him therein, the court thereby acquires jurisdiction over him and can garnish a debt and condemn it, provided the garnishee could himself be sued by his creditor in that state, and such a judgment is entitled to full faith and credit in the courts of another state.

Harris v. Balk, (1905) 198 U. S. 222, which was a case in which a resident of North Carolina was indebted to another resident of that state, and while temporarily in the state of Maryland was served with a foreign or nonresident writ of attachment, attaching a debt due by his creditor to a resident of Maryland. The judgment obtained in Maryland on such process was entitled to full faith and credit in the courts of North Carolina as a defense to a suit against the

garnishee by his creditor; and the court said that when a debt has been attached by garnishment process and the garnishee is without defense to set up against the attachment of the debt, there is no reason why he should not consent to a judgment impounding the debt, and this constitutes no voluntary payment, and such a judgment is entitled to full faith and credit in the courts of another state.

(f) *Service on Foreign Corporations.* — When foreign corporations are sued, the record must show affirmatively not only that there was service upon the agent, but that the corporation was in fact doing business in the state. This latter fact being shown, the court will assume, in the absence of proof to the contrary, that the party returned served as agent is in fact a representative of the corporation, but not otherwise.

Henning v. Planters' Ins. Co., (1886) 28 Fed. Rep. 444.

b. **FRAUD.** — The provision of the Constitution does not prevent an inquiry whether the judgment sued upon is founded in, and impeachable for, a manifest fraud.

Cole v. Cunningham, (1890) 133 U. S. 112.

"All the subsequent English authorities concur in holding that any foreign judgment, whether *in rem* or *in personam*, may be impeached upon the ground that it was fraudulently obtained. * * * Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in this country. It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it." *Hilton v. Guyot*, (1895) 159 U. S. 206.

The effect of this clause and the Act of Congress passed thereunder is that in the courts of other states the judgment of a court of one state is not impeachable except

for fraud or want of jurisdiction, is indisputable proof that it rests upon an unanswerable cause of action, is conclusive evidence that the right to its enforcement is wholly unaffected by any laches or lapse of time which preceded its rendition, and gives a right of action for its enforcement subject to limitation and other laws of the forum which regulate, but do not deny, unreasonably restrict, or oppressively burden the exercise of that right. *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 441.

"Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." *Hanley v. Donoghue*, (1885) 116 U. S. 1. See also *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 291.

A Plea that a Judgment Was Procured by Fraud Was Held Bad on general demurrer.

Christmas v. Russell, (1866) 5 Wall. (U. S.) 305, wherein the court said: "Subject to those qualifications, the judgment of a state court is conclusive in the courts of all the other states wherever the same matter is brought in controversy. Established rule is that so long as the judgment remains in force it is of itself conclusive of the right of

the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment. * * * Domestic judgments, say the Supreme Court of Maine, even if fraudulently obtained, must nevertheless be considered as conclusive until reversed or set aside. Settled rule, also, in the Supreme

Court of Ohio, is that the judgment of another state, rendered in a case in which the court had jurisdiction, has all the force in that state of a domestic judgment, and that the plea of fraud is not available as an answer to an action on the judgment. Express decision of the court is that such a judgment can only be impeached by a direct proceeding in chancery. Similar decisions have been made in the Supreme Court of Massachusetts, and it is there held that a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of mistake or fraud, when it is offered in evidence against him in support of the title which was in issue in the cause in which it was recovered. Whole current of decisions upon the subject

in that state seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defense were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. State judgments, in courts of competent jurisdiction, are also held by the Supreme Court of Vermont to be conclusive as between the parties until the same are reversed or in some manner set aside and annulled. Strangers, say the court, may show that they were collusive or fraudulent; but they bind parties and privies." See also *Maxwell v. Stewart*, (1874) 22 Wall. (U. S.) 77.

c. JUDGMENT NOT RESPONSIVE TO ISSUES. — The full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other state in and of themselves require. It does not demand that a judgment rendered by a court which has jurisdiction of the person but which is in no way responsive to the issues tendered by the pleadings, and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state.

Reynolds v. Stockton, (1891) 140 U. S. 264.

d. EFFECT OF DISCHARGE IN INSOLVENCY PROCEEDINGS. — A judgment creditor who has re-sued his judgment in the court of another state, and also joined in insolvency proceedings in the state in which the original judgment was obtained, under which insolvency proceedings the debtor obtained his discharge, cannot maintain suit on the judgment obtained in the other state court.

Brest v. Smith, (1860) 5 Biss. (U. S.) 62, 4 Fed. Cas. No. 1,843. See also *Clay v. Smith*, (1830) 3 Pet. (U. S.) 411.

An action on a judgment obtained in a state court by a nonresident of that state cannot be maintained against a plea of discharge under the insolvent laws of that state.

The creditor having voluntarily subjected himself to the jurisdiction of that state, the judgment was subject to the judicial authority of that state, and the creditor was bound by the subsequent action of the courts of that state, whether he resided in the state or not. *Davidson v. Smith*, (1860) 1 Biss. (U. S.) 346, 7 Fed. Cas. No. 3,608.

e. AGAINST PUBLIC POLICY OF STATE IN WHICH ACTION ON JUDGMENT BROUGHT. — A state court, in sustaining a demurrer to a complaint in a cause of action based upon the decision and judgments of the courts of another state, and upon the statutes of that state, has not failed to give full faith and credit to the laws and judgments of that state and its courts, when the courts of the state in which the suit is brought hold that no cause of action is set forth in the pleading and that it is against the public policy of the state to permit an action for such a purpose.

Finney v. Guy, (1903) 189 U. S. 340.

8. Power of States to Legislate on Remedy — *a. IN GENERAL.* — There is no clause in the Constitution which restrains the right in each state to legislate

upon the remedy in suits on judgments of other states exclusive of all interference with their merits.

Bacon v. Howard, (1857) 20 How. (U. S.) 25. See also *Matter of Perkins*, (1852) 2 Cal. 434.

b. STATUTE OF LIMITATIONS — (1) *Limitation Governed by Lex Fori.* —

There is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. It being settled that the statute of limitations may bar recoveries upon foreign judgments; that the effect intended to be given under our Constitution to judgments is that they are conclusive only as regards the merits; the common-law principle then applies to suits upon them, that they must be brought within the period prescribed by the local law, the *lex fori*, or the suit will be barred.

M'Elmoyle v. Cohen, (1839) 13 Pet. (U. S.) 328. See also *Alabama State Bank v. Dalton*, (1860) 9 How. (U. S.) 528; *Randolph v. King*, (1867) 2 Bond (U. S.) 104, 20 Fed. Cas. No. 11,560.

As construed by highest court of the state.
— The limitation of actions is governed by

the *lex fori*, and is controlled by the legislation of the state in which the action is brought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. *Great Western Tel. Co. v. Purdy*, (1896) 162 U. S. 329.

May Be Pleaded by Stockholder to an Order for Assessment. — A state court made an order for an assessment in a proceeding to which the corporation was a party but to which a certain stockholder was not. In an action brought by a receiver in another state in the name of the company to recover the sum supposed to be due under the assessment, the stockholder had the right to plead the statute of limitations, and the court, in sustaining that defense, did not deny to the order for the assessment the full faith and credit to which it was entitled.

Great Western Tel. Co. v. Purdy, (1896) 162 U. S. 335.

(2) *Cannot Cut Off Right of Action on Foreign Judgment.* — A statute which enacted that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of such action would have been barred by any act of limitation of this state, if such suit had been brought therein," was held to be unconstitutional as affecting the right of a plaintiff to enforce a judgment obtained in another state which was valid in that state and conclusive between the parties in all her tribunals.

Christmas v. Russell, (1866) 5 Wall. (U. S.) 301, wherein the court said: "Instead of being a statute of limitations in any sense known to the law, the provision in legal effect is but an attempt to give operation to the statute of limitations of that state in all the other states of the Union by denying the efficacy of any judgment recovered in another state against a citizen of Mississippi for any cause of action which was barred in her tribunals under that law."

A statute of a state which bars action against its residents upon judgments of other states founded upon causes of action which were barred by statutes of limitations of the state which enacted the law, but which were not barred by the statutes of the state where the judgments were rendered, does not accord full faith and credit to the records and judicial proceedings of those states, and is unconstitutional and void. *Keyser v. Lowell*, (C. C. A. 1902) 117 Fed. Rep. 400.

(3) *Must Give a Reasonable Time.* — While the states have the power and right to prescribe the times within which actions may be brought against their citizens upon judgments, as well as upon other causes of action, it is always conditioned that such statutes must allow a reasonable time to enforce rights of action in the state of their enactment, that they may not lawfully strike down the right of action by destroying or denying all remedy for its enforcement, and that they may not repeal or nullify the provisions of the Constitution of the United States and of the Act of Congress.

Keyser v. Lowell, (C. C. A. 1902) 117 Fed. Rep. 400.

A limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and this opportunity must be afforded in respect of existing rights of action after they come within the present or prospective operation of the statute, and in respect of prospective rights after they accrue. "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances.

A single period cannot be fixed for all cases, because what would be reasonable in one class of cases would be entirely unreasonable in another. Each limitation must, therefore, be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and, if the time is reasonable in respect of the class, it will not be adjudged unreasonable merely because it is deemed to operate harshly in some particular or exceptional instance; as where the person against whose right the limitation runs is under some disability, out of the state, or unavoidably prevented from suing within the time prescribed." *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 442.

Two-year Statute. — A state statute declared that upon judgments obtained in any court out of the limits of the state actions should be commenced within two years after the passage of the Act and not afterwards. It was held that this statute was valid under the Act of Congress passed pursuant to this constitutional provision, and applicable to a case where the person against whom the judgment was given became a citizen of the state upon the very day on which he was sued upon the judgment.

Alabama State Bank v. Dalton, (1850) 9 How. (U. S.) 522.

(4) *Time Action Accrues Not a Federal Question.* — The question at what time a cause of action accrues, within the meaning of a state statute of limitations, is not a federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by the Supreme Court of the United States.

Great Western Tel. Co. v. Purdy, (1896) 162 U. S. 329.

2. Judgments in Particular Cases Conclusive Vel Non — a. REAL ESTATE SUBJECT TO CONTROL OF STATE IN WHICH LOCATED. — In an action brought in the state of New York against an executrix, in which it was alleged that the testator was indebted to the plaintiff for certain trust moneys which he had entrusted, and that he had conveyed to his executrix certain real estate in Tennessee under such circumstances as to cause the deed to be void as against plaintiff's claim, judgment was rendered that plaintiff recover the trust money and that the deed to the executrix be declared void as against plaintiff's claim. Such judgment should be considered binding on the courts of Tennessee so far as it indicated the right of the plaintiff to recover as creditor of the estate.

By the terms of the judgment no provision whatever was made for its enforcement as against the executrix in respect of the real estate. No conveyance was directed, nor was there any attempt in any way to exert control over her in view of the conclusion that the court announced. Direct action upon the real estate was certainly not within the power of the court, and as it did not order the executrix to take any action with reference to it, and she took none, the courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee, exclusively subject to its laws and the jurisdiction of its courts.

Carpenter v. Strange, (1891) 141 U. S. 106.

b. LAW OF DESCENT OR TRANSMISSION OF LAND. — A law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy, and a court in a state in which land is situated is not controlled by a decree of a court in any other state deciding that the land passed by the law of that state and not according to the law of the state in which the land is situated.

Clarke v. Clarke, (1900) 178 U. S. 186.

c. PROBATE OF WILL. — The probate of a will in one state must be deemed conclusive so far as that state is concerned, and the will held sufficient to pass all property which can be there transferred by a valid instrument of that kind, but such probate does not take the place of provisions necessary to its validity as a will of real property in other states, if they are wanting. Its validity as such will in other states depends on its execution in conformity with their laws; and if probate there be also required, such probate must be had before it can be received as evidence.

Robertson v. Pickrell, (1883) 109 U. S. 611.

Evidence of probate of a will of lands. — When a state law does not make the probate of a will of lands evidence *per se* in a land cause in the courts of that state, but in permitting it to be read in evidence to a jury they are at liberty to find for or against the

will and not bound from the production of the probate to find in favor of the party producing it, it is entitled to no more credit in the courts of another state where there is no rule of law in that state which could make such a document good evidence under the laws of that state. *Darby v. Mayer*, (1825) 10 Wheat. (U. S.) 465.

d. ANCILLARY PROBATE JUDGMENT. — A judgment in a probate proceeding which was merely ancillary to probate proceedings in another state ordering the residue of the estate to be assigned to the legatee and discharging the executor from further liability, does not prevent a creditor, a nonresident of the state in which the judgment was rendered, from setting up his claim in the state probate court having the primary administration of the estate.

Borer v. Chapman, (1887) 119 U. S. 599.

e. RELATING TO MARRIAGE AND DIVORCE — (1) *In General.* — The Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the states, or its dissolution.

Andrews v. Andrews, (1903) 188 U. S. 32. See also *supra*, p. 149, *Want of Jurisdiction — Of the Parties or the Subject-matter — Decree of Divorce Made in Another State.*

(2) *Decree of Separation.* — A married woman filed a bill in an Illinois court, praying for a decree that she was living apart from her husband without her fault and that the husband provide for the separate maintenance of the complainant and the support of the children. Pending the suit a document was filed by the husband, in part reciting, without collusion: "I do hereby stipulate that the plaintiff, at the time of the commencement of this suit, was living, and ever since has been living, separate and apart from her husband, without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance." After a reference to a master to take evidence, a decree was finally entered that the court "doth find that the said complainant, at the time of the commencement of this suit, was living, and ever since that time has lived, and is now living, separate and apart from her husband, the said defendant, without her fault, and that the equities of this cause are with the complainant." The decree was entitled to full faith and credit in an action subsequently brought by the husband in another state, and conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband.

Harding v. Harding, (1905) 198 U. S. 317.

(3) *Decree of Alimony.* — The requirement as to full faith and credit to be given to a judgment of a court of another state refers to judgments made debts of record, not examinable upon the merits, and does not refer to such judgments as may be modified from time to time by order or decree, as in the case of allowances for alimony.

Lynde v. Lynde, (1901) 181 U. S. 186.

f. IN ACTIONS BETWEEN FOREIGN CORPORATIONS. — A state statute, as construed by the state courts, excluding foreign corporations from suing upon judgments obtained in another state, is not objectionable as denying to those judgments full faith and credit.

Anglo American Provision Co. v. Davis Provision Co. No. 1, (1903) 191 U. S. 374, *affirming* (1902) 169 N. Y. 509, in which it was held that a statute providing that "an action against a foreign corporation may be maintained by another foreign corporation,

* * * in one of the following cases only:
* * * 3. Where the cause of action arose within the state," is not invalid under this clause as denying the right of action on a foreign judgment in a case in which both parties are foreign corporations.

g. CONFESSION OF JUDGMENT. — Though a confession of judgment upon a note, with warrant of attorney annexed, in favor of the holder, is in conformity with state law and usage as declared by the highest court of the state in which the judgment is rendered, the judgment when sued on in another state may be collaterally attacked upon the ground that the party in whose behalf it was rendered was not in fact the holder because not the real owner of the note, without doing violence to this clause.

National Exch. Bank v. Wiley, (1904) 195 U. S. 285.

h. CONSENT JUDGMENT. — When it is the general rule that a consent decree has the same force and effect as a decree *in invitum*, the same effect must be given to such a decree in the courts of another state.

Harding v. Harding, (1905) 198 U. S. 335.

i. **TAKING SUCCESSION ON MONEY INDEFINITELY ON DEPOSIT.** — A state succession tax statute imposes a tax upon the transfer of any property, real or personal, when the transfer is by will or intestate law of property within the state and the decedent was a nonresident of the state at the time of his death. Taxing under this statute money which had been on deposit an indefinite time, after the whole succession had been taxed in the state in which the testator resided, does not deny full faith and credit to the judgment taxing the inheritance in the other state.

Blackstone v. Miller, (1903) 188 U. S. 203.

j. **POWER TO ENJOIN ENFORCEMENT OF FOREIGN JUDGMENTS.** — The courts of one state have no jurisdiction to enjoin the enforcement of judgments at law obtained in another state, when the same reasons assigned for granting the restraining order were passed upon on a motion for a new trial in the action at law and the motion denied. "This jurisdiction will be exercised where to enforce a judgment recovered is against conscience, and where the applicant had no opportunity to make defense, or was prevented by accident, or the fraud or improper management of the opposite party, and without fault on his own part."

Embury v. Palmer, (1882) 107 U. S. 13.

k. **ENJOINING PROSECUTION OF ATTACHMENTS IN ANOTHER STATE.** — A decree of the Supreme Court of Massachusetts, restraining citizens of that state from the prosecution of attachment suits in New York, brought by them for the purpose of evading the laws of their domicile, and with intent to avoid the effect of their creditors' assignment so far as the property attached was concerned, was not void as taking away, in violation of the Constitution, rights and interests gained by the attachments in New York, when the attachment suits had not gone to judgment, and the assignees in insolvency had proceeded with due diligence as against these creditors, citizens of Massachusetts, who were seeking to evade the laws of their own state.

Cole v. Cunningham, (1890) 133 U. S. 134.

III. JURISDICTION OF SUPREME COURT OF UNITED STATES. — The Supreme Court of the United States has jurisdiction under this clause when a state Supreme Court has decided against the effect which it was claimed proceedings in another state had by the law and usage in that state.

Green v. Van Buskirk, (1868) 7 Wall. (U. S.) 145. See also *Andrews v. Andrews*, (1903) 188 U. S. 28; *Crapo v. Kelly*, (1872) 16 Wall. (U. S.) 621.

This provision does not require the Supreme Court of the United States to assume jurisdiction of a case for the purpose of giving effect to a judgment obtained by a state against a citizen of another state in the courts of the state suing, when the suit was of such a nature that the Supreme Court could not have taken original jurisdiction. *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U. S. 293.

The Supreme Court must judge for itself of the true nature and effect of the order.

relied on. *Great Western Tel. Co. v. Purdy*, (1896) 162 U. S. 335.

If a state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability and nothing else, the Supreme Court of the United States cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, the federal court, in determining whether full faith and credit have been given to that judgment, must decide for itself the nature of the original liability. *Huntington v. Attrill*, (1892) 146 U. S. 684.

ARTICLE IV., SECTION 2.

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

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I. NOT APPLICABLE TO ACTS OF INDIVIDUALS. — This clause merely secures and protects the right of a citizen of one state of the United States to pass into any other state of the Union for the purpose of engaging in lawful business, to acquire and hold property, to maintain actions in the courts of that state, and to be exempt from taxes and excises not imposed by the state on its citizens, free from all discriminations — such discriminations being made by the state in its capacity of a sovereign — but does not apply to acts of individuals.

U. S. v. Morris, (1903) 125 Fed. Rep. 323.

II. NATURE OF PRIVILEGES AND IMMUNITIES — 1. In General. — The term is to be confined to those privileges and immunities of citizens which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. They may all be comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain

actions of any kind in the courts of the state; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities.

Corfield v. Coryell, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230. See also *U. S. v. Anthony*, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459; *Chambers v. Church*, (1884) 14 R. I. 399.

The foregoing definition was approved in *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 97, in commenting on *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371.

But as to the right of suffrage, see *infra*, *Privilege of voting and being voted for*.

The words "privileges and immunities" relate to the rights of persons, places, or property. *Magill v. Brown*, (1833) 16 Fed. Cas. No. 8,952.

Privileges and immunities are synonymous terms. Privilege signifies a peculiar advantage, exemption, immunity; immunity signifies exemption, privilege. *McGuire v. Parker*,

(1880) 32 La. Ann. 833. See also *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 554.

Clause in Articles of Confederation. — The purpose of this provision is the same and the privileges and immunities intended are the same as appear in the fourth of the articles of the old Confederation declaring "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively." *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 75.

2. Privileges Belonging to Citizenship. — No privileges are secured by this clause except those which belong to citizenship. Rights attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges of a citizen," within the meaning of the Constitution.

Conner v. Elliott, (1855) 18 How. (U. S.) 593. See also *Norfolk, etc., R. Co. v. Pennsylvania*, (1890) 136 U. S. 118; *Pembina Consol Silver Min., etc., Co. v. Pennsylvania*, (1888) 125 U. S. 186; *Paul v. Virginia*, (1868) 8 Wall. (U. S.) 180.

Privileges are personal. — The privileges and immunities guaranteed to the citizens in

the several states are annexed to their status of citizenship. They are personal and may not be assigned or imparted by them or any of them to any other person, natural or artificial, and a corporation cannot claim privileges and immunities on the strength of the citizenship of the corporators. *Slaughter v. Com.*, (1856) 13 Gratt. (Va.) 767.

3. Right to Hold Real and Personal Property. — This clause secures and protects the right to acquire personal property and to take and hold real estate.

Ward v. Maryland, (1870) 12 Wall. (U. S.) 430, reversing (1869) 31 Md. 283. See also *Mason v. West Branch Boom Co.*, (1858) 3 Wall. Jr. (C. C.) 252, 16 Fed. Cas. No. 9,232; *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 554.

Exemption from law of alienage. — Among the privileges of the citizens of every state is that of exemption from the law of alienage

though not born in the state; and every body of private persons united or incorporated has the franchise and immunity of enjoying estates in succession; these are exemptions from the rigor of the common law, which the citizens of other states may enjoy in one state as fully as the citizens of that state. *Magill v. Brown*, (1833) 16 Fed. Cas. No. 8,952. See also *Blake v. McClung*, (1898) 172 U. S. 256.

4. Privilege of Voting and Being Voted For. — The privilege of voting and being voted for in another state is not given by this clause.

Chickasaw Constitution, (1857) 8 Op. Atty.-Gen. 300. See also *Ward v. Morris*, (1799) 4 Har. & M. (Md.) 340.

A state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who

becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states. *Blake v. McClung*, (1898) 172 U. S. 256.

5. Privileges Enjoyed by Citizens in Their Own States. — The privileges and immunities secured to the citizens of each state in the several states, by this provision, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states.

Paul v. Virginia, (1868) 8 Wall. (U. S.) 180.

A state is not required to give to citizens of another state any higher privileges than those given to its own citizens, and a foreign

citizen is not entitled to have enforced in the courts of the state all the rights of whatever kind which he might be possessed of under the laws of the state where he resides. *Reynolds v. Geary*, (1857) 26 Conn. 183.

6. Of Citizens of State Whose Laws Are Complained of — *a. IN GENERAL.* — This provision did not create those rights which it calls privileges and immunities of citizens of the United States. It threw around them no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens. "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 77. See *Live Stock Dealers, etc., Assoc. v. Crescent City Live Stock Landing, etc., Co.*, (1870) 1 Abb. (U. S.) 388, 15 Fed. Cas. No. 8,408.

The protection designed by this clause has no application to the citizens of the state whose laws are complained of. *Bradwell v. Illinois*, (1872) 16 Wall. (U. S.) 138.

This provision does not make the privileges and immunities enjoyed by the citizen of one state, under the constitution and laws of that state, the measure of the privileges and immunities to be enjoyed as of right by a citizen of another state under its constitution

and laws. *McKane v. Durston*, (1894) 153 U. S. 687.

This clause was intended to secure citizens of one state against discriminations made by another state in favor of its own citizens, and not to secure the citizens of any state against discriminations made by their own state in favor of the citizens of other states, nor to secure one class of citizens against discriminations made between them and another class of citizens of the same state. *Com. v. Griffin*, (1842) 3 B. Mon. (Ky.) 208, holding that the clause did not prohibit Kentucky from providing, by appropriate penalty, the importation of slaves by her own citizens.

b. TAXING DEBT HELD BY RESIDENT UPON NONRESIDENT. — The Constitution does not prohibit a state from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides, so long as the state, by its

laws, prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States.

Kirtland v. Hotchkiss, (1879) 100 U. S. 498.

A state may tax negotiable public securities, corporate stock, etc., which have an actual situs outside the state, upon the ground that the owner is a resident of the state and

his domicile the situs of such obligation, while at the same time taxing like securities actually within the state which are owned by residents of other states. *Western Assur. Co. v. Halliday*, (C. C. A. 1903) 126 Fed. Rep. 259.

C. PROHIBITING ASSIGNMENT TO SECURE COLLECTION BY FOREIGN ATTACHMENT. — A state statute, the purpose of which is to secure to laborers within the commonwealth the benefit of the exemption laws of the state, and to prevent assignment of claims for the purpose of securing their collection against laborers outside of the state, is not obnoxious to this clause.

Sweeny v. Hunter, (1891) 145 Pa. St. 364. But see *In re Flukes*, (1900) 157 Mo. 127, wherein it was held that Missouri statutes subjecting any person to fine and imprisonment, who sends out of the state, etc., any note, etc., account, etc., for the purpose of instituting any suit thereon in a foreign jurisdiction against a resident of the state, for the purpose of having execution, attachment, garnishment, etc., issued in such suit, or upon a judgment rendered in such suit, against the wages of a resident of the state, and having such process served upon any corporation subject to the processes of the courts of the state, which is indebted to a resident

of the state for wages, and further providing that no person can be "charged as garnishee on account of wages due from him to a defendant in his employ for the last thirty days' service, provided such employee is the head of a family and a resident of this state," were invalid. Such statutes result in exempting all those single men residents, etc., whose wages are attempted to be seized under process of a foreign court, while they leave unexempt those whose wages are garnished under process of the Missouri courts.

See *infra*, under the Fourteenth Amendment.

III. WHO ARE CITIZENS — 1. Corporations as Citizens. — Corporations are not citizens within the meaning of this clause. The term "citizens" as there used applies only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.

Paul v. Virginia, (1868) 8 Wall. (U. S.) 177. See also the following cases:

United States. — *Blake v. McClung*, (1898) 172 U. S. 259; *Norfolk, etc., R. Co. v. Pennsylvania*, (1890) 136 U. S. 118; *Railroad Tax Cases*, (1882) 13 Fed. Rep. 747.

Illinois. — *Barnes v. People*, (1897) 168 Ill. 426.

Indiana. — *Maloy v. Madget*, (1874) 47 Ind. 241.

Kentucky. — *Phoenix Ins. Co. v. Com.*, (1868) 5 Bush (Ky.) 68.

Louisiana. — *State v. Hammond Packing Co.*, (1903) 110 La. 180.

Vermont. — *Hawley v. Hurd*, (1900) 72 Vt. 124.

Though citizens under jurisdiction clause. — This provision is not for corporate bodies, which are citizens in no sense except for redress of grievances in the courts of the Union. In them they are such by judicial construction. *Baltimore, etc., Tel. Co. v. Delaware, etc., Tel., etc., Co.*, (1885) 7 Houst. (Del.) 279.

A Corporation Does Not Have the Rights of Its Personal Members, and cannot invoke the provision of this section which gives to the citizens of each state the privileges and immunities of the citizens of the several states.

Waters-Pierce Oil Co. v. Texas, (1900) 177 U. S. 45.

A corporation is not a citizen within the meaning of this clause. If the principle that in a question of jurisdiction the court might look to the character of persons composing a corporation were held to embrace contracts,

and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens and be bound by their contracts in like manner. The result

of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would

bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. *Augusta Bank v. Earle*, (1839) 13 Pet. (U. S.) 586.

No Exception Exists in Favor of National Banks to the rule that a corporation is not a citizen within the meaning of this clause.

Hawley v. Hurd, (1900) 72 Vt. 124.

2. Regulating or Prohibiting Foreign Corporations Doing Business in the State

— **a. IN GENERAL.** — A state statute which provides that no foreign corporation which does not invest or use its capital in the state shall have an office or offices in that state, for the use of its officers, stockholders, agents, or employees, unless it shall first have obtained an annual license so to do, does not conflict with this provision.

Pembina Consol. Silver Min., etc., Co. v. Pennsylvania, (1888) 125 U. S. 182. See also *Waters-Pierce Oil Co. v. Texas*, (1900) 177 U. S. 45; *Norfolk, etc., R. Co. v. Pennsylvania* (1890) 136 U. S. 118; *Home Ins. Co. v. Davis*, (1874) 29 Mich. 238; *Stanhilber v. Mutual Mill Ins. Co.*, (1890) 76 Wis. 285.

See also *Foreign Corporations*, 8 FED. STAT. ANNOT. 522.

There can be no question of the validity of a state statute which makes it unlawful for any corporation to do or attempt to do any business or to own or acquire any property in the state without first complying with the provisions of the statute. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. Rep. 532.

A state has power to subject to taxation bonds actually in the state owned by a cor-

poration created by the laws of a foreign country which is doing business in the state by virtue of its compliance with the law requiring that it shall, as a condition, protect the contracts it shall make with residents of the state, by the deposit of securities in the hands of a statutory trustee. *Western Assur. Co. v. Halliday*, (C. C. A. 1903) 126 Fed. Rep. 259.

While for jurisdictional purposes a corporation is considered a citizen of the state creating it, yet it is not regarded as having the rights of an actual citizen anywhere else, and a state statute imposing upon foreign insurance companies, sued upon a policy, twelve per cent. on the amount sued for under the policy, and attorney's fees, does not violate this clause. *Berry v. Mobile L. Ins. Co.*, (1878) 1 Tex. L. J. 157, 3 Fed. Cas. No. 1,358.

Conditions Must Be Complied with. — The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state.

Crutcher v. Kentucky, (1891) 141 U. S. 59.

A New York statute providing that "it shall not be lawful for any person to act within this state, as agent or otherwise, in receiving or procuring application for insurance in, or in any manner to aid in transacting the insurance business of, any company or association, not incorporated under the laws of this state, until he has procured a certificate from the comptroller, that the company or association, for which he acts, has complied with all the provisions of this

Act," is valid. *People v. Imlay*, (1855) 20 Barb. (N. Y.) 68.

The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of the legislature. *Hartford F. Ins. Co. v. Raymond*, (1888) 70 Mich. 501.

It cannot matter that the charter of the corporation declares that it may do business in other states. Such a provision can only operate as an authority to the company to do so on such terms as other states might

prescribe; as a state cannot enact laws regulating the action of persons, the title to property, or the effect of contracts, outside its limits. *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, (1870) 55 Ill. 90.

Deposit of state bonds.—A state statute which enacts that no insurance company not incorporated under the laws of the state passing the statute shall carry on its business within the state without previously obtaining a license for that purpose, and that it shall not receive such license until it has deposited with the treasurer of the state bonds of a specific character to an amount varying from thirty to fifty thousand dollars, according to

the extent of the capital employed, is not in conflict with that clause of the Constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *List v. Com.*, (1888) 118 Pa. St. 327.

Privilege tax on foreign corporations.—The state has the power and right to impose upon corporations chartered by other states a tax for the privilege of transacting business in such state, though no such burden be imposed upon like corporations chartered by its own legislature. *Com. v. Milton*, (1851) 12 B. Mon. (Ky.) 212.

There Is No Doubt of the Power of the State to Prohibit Foreign Insurance Companies from doing business within its limits. The state can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute.

Allgeyer v. Louisiana, (1897) 165 U. S. 583.

See *infra*, *Discriminating Against Individuals Transacting Insurance*, p. 179.

Prohibition must be clearly expressed.—"Although it would be competent, by legislation, to invalidate in our courts an insurance contract made in good faith in another state

on property located here, it would be so contrary to the comity which has been observed between the states, that such an intention will not be imputed to the lawmaker, unless the language used so clearly expresses that purpose as to bear no other reasonable interpretation." *Columbia F. Ins. Co. v. Kinyon*, (1874) 37 N. J. L. 35.

The Correlative Power to Revoke or Recall a Permission is a necessary consequence of the main power. A mere license by a state is always revocable, and the power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect.

Doyle v. Continental Ins. Co., (1876) 94 U. S. 540.

Statutes Regulating the Agencies of companies not incorporated by the state are valid.

Ducat v. Chicago, (1870) 10 Wall. (U. S.) 410. See also *Liverpool Ins. Co. v. Massachusetts*, (1870) 10 Wall. (U. S.) 573, as to an English association which has the attributes of an American corporation.

Prohibiting nonresidents acting as agents for foreign insurance companies.—A *Vermont* statute which provides that the license issued to a foreign insurance corporation shall limit it in doing business to "lawfully constituted and licensed resident agents" is valid and binding on the company in its corporate entity and cannot be less so on the agents of the company. *Cook v. Howland*, (1902) 74 Vt. 396.

Tax on insurance agents.—An *Illinois* statute which imposes a tax upon an agent of insurance companies established in other states of \$2 upon every \$100 of premiums he, as such agent, receives on policies issued by the companies, is valid. Corporations have no situs in states as citizens of the state creating them, and when they enter other states to do business and make profits, a discrimination can be rightfully made between them and domestic corporations of the

same character. *Ducat v. Chicago*, (1868) 48 Ill. 173.

A *Kentucky* statute imposing a tax on agents of any insurance company not chartered by the legislature of Kentucky, on all premiums received within the state, is valid. *Phoenix Ins. Co. v. Com.*, (1868) 5 Bush (Ky.) 68.

A *New Jersey* statute imposing a special tax of two and one-half per cent. upon the gross amount received as premiums for insurance in that state, by nonresident individuals or companies incorporated by the laws of the state, is not a violation of this clause as applied to the business of the nonresident insurance companies. *Tatem v. Wright*, (1852) 23 N. J. L. 440.

Tax on express agents.—A *Kentucky* statute providing "that it shall not be lawful, after the first day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth, to set up, establish, or carry on the business of transportation in this state, without first obtaining a license from the auditor of public accounts to carry on such business," is not

void as discriminating against nonresidents. *Woodward v. Com.*, (Ky. 1887) 7 S. W. Rep. 614, in which case the court said: "The Constitution of the United States declares that 'the citizens of each state shall be entitled to all the immunities of citizens in the several states.' But a corporation is but a creature of the local law. It has no absolute right of recognition in any state save that of its creation. It has no extraterritorial operation, save by comity. The validity of its action, the exercise of any right whatever by it, indeed, even the recognition of its existence, in any other state, depend altogether upon its will and consent. One state cannot force its artificial creature into another. If it could, it would thereby transport its laws for the government of another equal state. If the corporation be accorded

any rights appertaining to citizenship in another state, it is by its sanction, either express or implied. It may forbid its presence altogether; and it therefore follows, of course, that it may impose such restrictions as it chooses, provided they are not open to constitutional objection. The 'immunities' secured by the organic law to the citizen of one state in the other states are such privileges as are common to the citizens of the latter states under their laws, and do not embrace special privileges created by his local law and enjoyed by him at home. Nor does the term 'citizen,' as used in the Constitution, include corporations. This is, therefore, not a case where a state has imposed a burden upon the citizens of another state not borne by its own."

b. WHEN ENGAGED IN INTERSTATE COMMERCE. — See *Exceptions as to Corporations Engaged in Interstate and Foreign Commerce*, 8 FED. STAT. ANNOT. 523.

c. WHEN ENGAGED AS AGENCIES OF NATIONAL GOVERNMENT. — In the pursuit of business authorized by the government of the United States, and under its protection, the corporations of other states cannot be prohibited or obstructed by any state.

Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 14, wherein the court said: "If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the neces-

sary timber and iron in any state of the Union." See also *Huffman v. Western Mortg., etc., Co.*, (1896) 13 Tex. Civ. App. 170.

3. Free Negroes as Citizens Before Adoption of Thirteenth Amendment. —

A negro whose ancestors were imported into this country and sold as slaves cannot become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges and immunities granted by that instrument to the citizen.

Dred Scott v. Sandford, (1856) 19 How. (U. S.) 403.

Held to have been citizens, in Citizenship, (1862) 10 Op. Atty-Gen. 382; *Smith v. Moody*, (1866) 26 Ind. 299; *Walsh v. Lallande*, (1873) 25 La. Ann. 188; *State v. Manuel*, (1838) 4 Dev. & B. L. (20 N. Car.) 20.

Held not to have been citizens, in *Amy v.*

Smith, (1822) 1 Litt. (Ky.) 326; *State v. Claiborne*, (1838) Meigs (Tenn.) 331.

An Arkansas statute prohibiting the immigration and settlement of free negroes or persons of color into the state is not in conflict with this clause, as free negroes or free persons of color are not citizens within its meaning. *Pendleton v. State*, (1844) 6 Ark. 509.

4. Residents in Unorganized Territories and Indian Reservations. — This clause is a limitation upon the powers of the states, and in no wise affects the power of Congress over the unorganized territories and Indian reservations.

McFadden v. Blocker, (1900) 3 Indian Ter. 227, holding that an Arkansas statute extended over the Indian Territory by an Act of Congress by which, as to mortgages executed by nonresidents, a lien could only be created as against strangers by the mortgagee taking possession of the mortgaged property, was held to be valid.

Residents in Indian country. — A statute providing that in all final judgments against any person residing in the Indian country west of the state or contiguous thereto, a capias may be issued against the defendant, does not conflict with this clause, as the Indian country west of the state is not one of the states or territories of the Union. *Sutton v. Hays*, (1856) 17 Ark. 462.

IV. LEGISLATION AFFECTING PRIVILEGES AND IMMUNITIES — 1. Construction to Give Operation to Statute. — If a privilege or immunity has been by the state conferred upon its citizens, and not in terms upon the citizens of other states, such privilege and immunity is not for that reason declared void, but the protecting arm of the Constitution is thrown around the citizens of every other state who thus are embraced within the privilege granted. The converse of the proposition is this, that when a state has sought to impose a burden upon citizens of other states not imposed upon citizens of its own state, such effort is always held to be void.

Matter of Johnson, (1903) 139 Cal. 538, wherein the court, referring to the case of *Blake v. McClung*, (1898) 172 U. S. 239, said: "Here, then, in precise terms, and from the highest court of our land, charged with the duty of construing our governmental law, it is declared that the purpose of the constitutional guaranty is to confer and communicate all privileges which may thus be granted by a state to its own citizens, a rule of construction obviously radically different from that which would strike down an immunity granted by a state to its own citizens, because in terms such immunity had not been conferred upon citizens of all the states. It is unnecessary that a statute should so expressly provide. The Constitution itself becomes a part of the law. And this, in giving operation to that constitutional provision, is what the courts have always done. They have never stricken down the immunity and the privilege which a state may have accorded to its own citizens. They have never annulled the exemption. They have always construed the law so as to relieve the citizens of other states, and place all upon equal footing. Thus in Vermont, where a statute exempted certain personal property of residents, but did not so exempt the like property

of nonresidents, the tax upon the latter, not the exemption upon the former, was adjudged void, so that nonresidents should enjoy the equal right of exemption. (*Sprague v. Fletcher*, (1896) 69 Vt. 69.) And in Massachusetts, where the state law required every corporation to retain and pay to the state one-fifteenth of all dividends payable to stockholders residing outside the state, the Supreme Court of Massachusetts in like manner adjudged the burden void, and extended the exemption to all citizens of sister states. (*Oliver v. Washington Mills*, (1865) 11 Allen (Mass.) 268.) And by the Supreme Court of Alabama the section of the statute imposing a tax upon slaves belonging to residents of other states higher than that imposed upon slaves belonging to citizens of the state was adjudged void only as to the burden. And for further instances reference may be made to *Wiley v. Parmer*, (1848) 14 Ala. 627; *Feeheimer v. Louisville*, (1886) 84 Ky. 306; *McGuire v. Parker*, (1880) 32 La. Ann. 832; *State v. Insurance Com'rs*, (1896) 37 Fla. 564; *Roby v. Smith*, (1891) 131 Ind. 342; *Shirk v. La Fayette*, (1892) 52 Fed. Rep. 857; *Black v. Seal*, 6 Houst. (Del.) 541; *Davis v. Pierse*, 7 Minn. 13.

2. State Taxation — a. DISCRIMINATING TAX ON SALES BY NONRESIDENTS. —

A state statute prohibiting persons not permanent residents from selling, offering for sale, or exposing for sale within a certain district of the state any goods whatever other than agricultural products and articles manufactured in the state, either by card, sample, or other specimen, or by written or printed trade list or printed catalogue, whether such persons be the makers or manufacturers or not, without first obtaining a license so to do on payment of an amount higher than that required of resident merchants, imposes a discriminating tax and is repugnant to this clause.

Ward v. Maryland, (1870) 12 Wall. (U. S.) 424, reversing (1869) 31 Md. 283. See also *Union Nat. Bank v. Chicago*, (1871) 3 Biss. (U. S.) 82, 24 Fed. Cas. No. 14,374. But see *Sears v. Warren County*, (1871) 36 Ind. 267, wherein it was held that an Indiana statute which requires a license fee to be paid by traveling merchants and peddlers who are not residents of the state is not in conflict with this clause. And to the same effect see *Beall v. State*, (1835) 4 Blackf. (Ind.) 107.

If a state legislature framed the provisions of a statute which relate to merchants and

sample merchants with the intention to discriminate against nonresidents in favor of residents, and against goods in other states sold by sample, in favor of goods held within the state for sale, and if they succeeded in this intention by legislation having that practical effect, such provisions are null and void. *Ex p. Thornton*, (1882) 12 Fed. Rep. 547.

A municipal ordinance designating the license fee to be paid by distilleries and breweries, and the depots or agencies in the city of all brewers and distillers and all

wholesale dealers in malt liquors, in providing that "the terms of this ordinance, however, shall not apply to any resident engaged in the wholesale business of bottling, or bottling and vending bottled beer," is invalid for discriminating in favor of residents as against nonresidents, and discriminating in favor of residents who bottle and vend bottled beer as against residents who vend beer in barrels, jugs, or otherwise. *Indianapolis v. Bieler*, (1893) 138 Ind. 37.

Must appear that they were dealers in foreign goods.—A municipal ordinance imposing a license tax "on all agents or dealers in beer or ale by the cask, not manufactured in this city but brought here for sale," cannot be held to be obnoxious to this clause when it is not alleged that the persons accused of its violation were dealers in foreign beer or ale, or even in beer or ale manufactured without the state. *Downham v. Alexandria*, (1869) 10 Wall. (U. S.) 175.

Drummer's and canvasser's licenses.—A municipal ordinance levying a tax on "every agency of a brewery of another state, doing business in the city," is a palpable discrimination in favor of domestic breweries and against breweries of another state, and is plainly offensive to this clause. *Cullman v. Arndt*, (1899) 125 Ala. 581.

A municipal ordinance which provides "that any person, whose principal place of business is not in this city, or who conducts his principal place of business without this city, and shall sell or offer to sell any goods, wares, or merchandise, by sample or representation, in this city, to any person other than persons living in or doing a license business in this city, must first obtain an annual license therefor, and shall pay for such license \$200," is void as discriminating against such dealers from other states. *Fecheimer v. Louisville*, (1886) 84 Ky. 307, in which case the court said: "The ordinance under which this payment was exacted applies to the resident of the state as well as the nonresident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed, and the fact that its provisions apply to the resident of the state as well as the nonresident, does not add to the validity of the act, or give strength to the argument in support of it."

A Louisiana statute imposing a license tax of \$25 per month upon all traveling agents from other states offering any species of merchandise for sale or selling the same, but exacting no license or tax upon the same class of persons who are citizens of the state of Louisiana, is void. *McGuire v. Parker*, (1880) 32 La. Ann. 832.

A New Hampshire statute which enacts, that no party shall sell, or act as the agent or receive subscriptions for the sale of, trees, shrubs, or vines, not grown in this state, unless he shall first obtain a license for that purpose, under a penalty of one hundred dollars for each offense, with the proviso that any citizen of this state may sell trees, shrubs,

and vines grown one year or more in lands or nurseries owned by him in this state, on which taxes have been paid, without procuring the license or incurring the penalty, does not give to citizens of other states the right to sell trees, shrubs, and vines grown one year or more in lands or nurseries owned by them in this state on which taxes have been paid, without a license, and they are not, in this respect, given the privileges and immunities of citizens of this state. *State v. Lancaster*, (1884) 63 N. H. 270.

A North Carolina statute providing that "every nonresident who shall sell any spirituous or malt liquors, goods, wares, or merchandise, by sample or otherwise, whether delivered or to be delivered, shall pay an annual tax of fifty dollars, and a tax of like amount as is payable by residents on their purchases or sales, as the case may be, of similar articles," etc., is repugnant to this clause. *Sinclair v. State*, (1873) 69 N. Car. 47.

Peddler's license.—A municipal ordinance providing "that every person who peddles, hawks, sells, or exhibits for sale, any goods, wares, or merchandise, not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares, or merchandise, for immediate or future delivery, about the streets, alleys, hotels, business houses, private dwellings, or at any public or private place in said city, without having paid the marshal from two to six dollars for each day, six to ten dollars for each week, and ten to twenty dollars for each month, at the discretion of the marshal, such person may desire to follow such business within said city, and receiving a permit therefor from the mayor of said city, shall, upon conviction thereof, be fined, forfeit, and pay to said city a sum not exceeding ten dollars for each day such person shall continue such business without receiving a permit as in this section set forth," is void as discriminating against citizens of other states. *Grafty v. Rushville*, (1880) 107 Ind. 502.

A municipal ordinance which professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license, and fixes the price of a license at a figure that makes the ordinance amount to prohibition, with a proviso which exempts all residents of the borough of Sayre from its operation, is invalid. *Sayre v. Phillips*, (1892) 148 Pa. St. 489.

A municipal ordinance imposing a license tax on hawking, peddling, or vending any fish, fruit, or vegetables is void in providing "that all farmers vending the produce of their own farms shall, on appearing before the commissioner of markets and city property, and satisfying him, under oath or affirmation, that they are farmers selling the produce of their own farms only, be entitled to receive a license without charge therefor, providing they are residents of the state of Pennsylvania. All nonresidents of this state shall be liable to the penalties of section 4." *Com. v. Simons*, (1894) 15 Pa. Co. Ct. 551.

A *Kansas* statute providing that it shall be a misdemeanor for any one to deal as a peddler without procuring and paying for a license from the county clerk, but expressly exempting from its operation the owner of goods peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto, attempts to impose a tax on nonresidents of the state from which certain residents of the state are exempted by the fact of such residence, which is an obvious discrimination in favor of the residents and against the nonresidents, and is repugnant to this clause. *In re Jarvis*, (1903) 66 Kan. 329.

A *Kentucky* statute (Gen. Stat., ch. 84, sec. 1) provides that "all itinerant persons vending goods, wares, and merchandise * * * shall be deemed peddlers," and the second section of that chapter prescribed a penalty for selling by such persons without first having obtained license therefor. A subsequent statute, entitled "An Act to amend chapter 84 of the General Statutes, title 'Peddlers,'" provides "that chapter 84 of the General Statutes, title 'Peddlers,' be, and the same is hereby, so amended that itinerant persons who are citizens of this state, and who vend exclusively goods, wares, and merchandise which are the growth, product, or manufacture of this state, shall not be deemed peddlers, nor required to take out license under the provisions of said chapter." The statute is void as a discrimination against the citizens of other states. *Rash v. Holloway*, (1885) 82 Ky. 675.

A *Michigan* statute which requires a license from any person engaged in the business of hawking, peddling, or pawnbrokerage by going about from door to door, or from place to place, or from any stand, cart, vehicle, or in any other manner in the public streets, but providing that "nothing contained in this Act shall prevent any person from selling any meat or fish in townships outside of any incorporated city or village, nor any nurseryman from selling his stock by sample or otherwise, nor any person, firm, or corporation engaged in the sale of farm machinery and implements, nor any manufacturer, farmer, or mechanic residing in this state from selling or offering for sale his work or production, by sample or otherwise, without license," is a clear discrimination against nonresidents. *Rodgers v. Kent Circuit Judge*, (1807) 115 Mich. 442.

A *New Hampshire* statute providing that a peddler's license shall be granted only for that county in which the applicant holds his residence cannot be so applied as to discriminate between citizens of other states. *Bliss's Petition*, (1884) 63 N. H. 135.

A *New Hampshire* statute which provides that "the treasurer of the state may grant such license [for the sale of lightning rods] for the term of one year, upon receiving from any applicant the sum of five hundred dollars, and from any applicant who has for the five years last past been a citizen of this state the sum of one hundred dollars," is in-

valid, as the citizens of other states are not given the privileges and immunities of citizens of that state. *State v. Wiggin*, (1888) 64 N. H. 508.

A *Vermont* statute which provides that no person shall be licensed as a peddler who has not resided in the state one year next preceding the application for a license is void as a discrimination against citizens of other states. *In re Watson*, (1882) 15 Fed. Rep. 511.

A *Virginia* statute provides: "That any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, *in transitu* or otherwise, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles. * * * Any peddler who shall peddle for sale, or sell or barter, without a license, shall pay a fine of not less than one hundred nor more than five hundred dollars for each offense. * * * This section shall be construed to include persons engaged in peddling lightning rods: provided, however, that any manufacturer who has been assessed and paid upon the capital employed by him, under Schedule 'C' of this Act, shall not be required to take out the license named in this section for the privilege of selling articles actually manufactured by him: provided, also, that all persons who do not keep a regular place of business (whether it be in a house, or vacant lot, or elsewhere), open at all times in regular business hours, and at the same place, who shall offer for sale goods, wares, and merchandise, shall be deemed peddlers under the provisions of this Act." Under the statute, a citizen of Virginia can hawk or peddle articles manufactured by him without incurring the penalties, and the statute is void as depriving the citizen of another state of the privileges and immunities possessed by the citizens of the state of Virginia. *Com. v. Myer*, (1896) 92 Va. 813.

Tax on sales made by auctioneers. — A provision in the charter of a town that the board of trustees thereof "shall have the power and authority to tax all auctioneers, in a sum not exceeding five per cent. for all goods, wares, merchandise, and articles sold to bidders within said town, except property sold by citizens of the town or county, and who are *bona fide* owners thereof, etc., and shall have a lien on the articles sold or to be sold for such tax until the same is paid, or the person selling the same takes out license for that purpose," contains inequality of privileges and immunities forbidden by this clause. *Daniel v. Richmond*, (1880) 78 Ky. 542. See also *McGraw v. Marion*, (1896) 98 Ky. 675.

Bill-posting ordinance. — A municipal ordinance requiring bill posters to take out a license before distributing or posting bills or printed matter, was held to interfere with or abridge the rights of a manufacturer in another state, and therefore was in conflict with this clause. *Angove v. State*, (1899) 9 Ohio Dec. 829.

b. **UNIFORM TAX ON SALES BY RESIDENTS AND NONRESIDENTS.** — A uniform tax imposed by a municipal corporation on all sales made in it, whether they be made by a citizen of the state or a citizen of some other state, and whether the goods sold are the produce of the state within which the municipal ordinance was passed or of some other state, is valid.

Woodruff v. Parham, (1808) 8 Wall. (U. S.) 123, *affirming* (1867) 41 Ala. 334.

"A state has not the right to pass a law imposing a tax directly upon the products of other states brought within its limits, nor can it impose a license upon dealers in such products which is not required of dealers in the same kind of products of domestic production or manufacture. * * * But a state has the power to require licenses for the various pursuits and occupations carried on and conducted within her limits, and to fix the amount thereof, as she may choose, provided the rights above mentioned are not infringed." *In re Sydow*, (1894) 4 Ariz. 210.

Coal brought from another state for sale can legally be taxed by the state into which it is brought, and the tax thus levied upon it is not obnoxious to this clause. *Brown v. Houston*, (1881) 33 La. Ann. 843.

Sale of fertilizers. — A *North Carolina* statute providing that no commercial fertilizers shall be sold or offered for sale until the manufacturer or importer obtains a license from the treasurer of the state, for which shall be paid a privilege tax of \$500 per annum for each separate brand, is not within the inhibitions of this clause. No privilege with regard to commercial fertilizers seems given by the Act to any citizen of North Carolina which is denied to a non-resident, and, unless this be attempted, it can hardly be said that it is deprived of any privilege or immunity which it is entitled to under the Constitution. *American Fertilizing Co. v. Board of Agriculture*, (1890) 43 Fed. Rep. 609.

Sale of sewing machines. — A *Georgia* statute imposing as a tax "upon every sewing-machine company selling or dealing in sewing machines in this state, and upon all wholesale dealers in sewing machines, selling sewing machines manufactured by companies that have not paid the tax herein required, \$200 for each fiscal year or fractional part thereof, to be paid to the comptroller general at the time of commencement of the business, and, in addition to the above amount, said companies or wholesale dealers shall furnish the comptroller general a list of all agents authorized to sell machines, and shall pay to said comptroller general the sum of \$10 for each of their agents in each country, for each year or fractional part thereof," is not in conflict with this clause. The language of the Act is certainly broad enough to cover all sewing machine companies, whether the company be of this state or of another state. The fact that no sewing machines are manufactured in the state cannot change the matter if the language of the tax act embraces such com-

panies as are now, or may hereafter during the operation of the law be, engaged in such manufacture in the state. *Singer Mfg. Co. v. Wright*, (1887) 33 Fed. Rep. 123.

Tax on goods consigned for sale. — A *California* statute providing, 1st, that all goods, wares, etc., brought into the state from any other state or foreign country, to be sold in this state, owned by any person not domiciled in the state, shall be declared consigned goods; and, 2d, that every person selling such consigned goods shall be taxed sixty cents on every \$100 worth of goods so sold, such tax to be paid by the person selling such goods, he having a lien on the owner for the same, does not violate this clause. No tax is levied on the foreign owner of consigned goods in the hands of the consignee, but only upon the sale, while all other consigned goods are taxed by the system of licenses, as part of the general property of the state. *People v. Coleman*, (1854) 4 Cal. 56.

Drummer's license. — A *Montana* statute providing that "every commercial traveler, agent, drummer, or other person, selling, or offering to sell, any goods, wares, or merchandise of any kind, to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares, and merchandise of any kind similar to said samples, to be delivered at some future time, shall, before carrying on such business, pay a license therefor," does not discriminate between persons who are citizens of the territory of Montana and citizens of other states or territories, and is not, therefore, in conflict with this clause. *Territory v. Farnsworth*, (1886) 5 Mont. 311.

A *Virginia* statute requiring a license to be obtained by every person who sells by sample card, etc., who is not a resident merchant, mechanic, or manufacturer, does not conflict with this clause. In light of the provision that "a license may be granted to any citizen of this state; to any person entitled to the privileges and immunities of a citizen thereof; to any person residing in the state; to any firm or company having a place of business in the state, and doing business thereat; to any corporation created by this state, or any of the United States," etc., a citizen of any of the United States has the same privilege of obtaining a license under this Act that a citizen of this state has, and is liable only to the same penalty that a citizen of the state is liable to for selling or offering to sell by sample without license. *Speer v. Com.*, (1873) 23 Gratt. (Va.) 939.

Peddler's license. — A *Pennsylvania* statute declaring that "it shall not be lawful for any person, or persons, to huckster, buy, or

barter for, within the limits of the counties of Bedford, Cumberland, Franklin, Fulton, and York, with the intent to sell or dispose of to any person or persons, outside of the said counties, respectively, butter, eggs, dried fruit, veal, chickens, turkeys, geese, ducks, or other poultry, without first taking out an annual license from the treasurers of said counties respectively," not discriminating against nonresidents, is valid. *Com. v. Shaffer*, (1889) 128 Pa. St. 575.

Of goods other than the growth or manufacture of the state. — An *Arizona* statute, providing that "there shall be collected a quarter-yearly license tax from all persons and corporations engaged in the business, trade, or occupation in this Act, named as follows: Merchants. Every person, firm, or corporation, who may deal in goods, wares, and merchandise, except in agricultural or horticultural products of this territory, when vended by the producer thereof, and except when sold by auctioneers or commission merchants, under license or permission according to law, * * * he or they shall pay a * * * license tax," does not violate this clause, except that part of it which permits the domestic producer of agricultural and

horticultural products to vend them without a license. *In re Sydow*, (1894) 4 Ariz. 207.

A *Maryland* statute providing that "no person or corporation, other than the grower, maker, or manufacturer, shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this state, without first obtaining a license in the manner herein prescribed," was held not to violate this clause, as it does not impose a discriminating tax upon nonresidents. *Corson v. State*, (1881) 57 Md. 264.

A *North Carolina* statute imposing a tax on merchants and dealers of one-tenth of one per centum of their purchases, and making an exception of "farm products purchased from the producer," makes no discrimination against products brought from elsewhere. It is couched in general terms, and exempts purchases of farm products from the producer, wherever raised, from being taken into account in ascertaining the basis upon which the amount of the license tax is graduated. This is neither necessarily nor within reasonable construction a discrimination against farmers in other states. *State v. Stevenson*, (1891) 109 N. Car. 730.

c. TAXATION OF PROPERTY OF NONRESIDENT. — The personal property of a nonresident, in a state where he is not domiciled, may be taxed in such latter state.

Catlin v. Hull, (1849) 21 Vt. 152.

Tax on property invested in business. — A *New York* statute which provides that all persons doing business in the state as merchants, bankers, or otherwise, and not resi-

dents of the state, shall be assessed and taxed on all sums invested in said business, the same as if they were residents of the state, is not a violation of the Constitution of the United States. *Duer v. Small*, (1859) 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116.

State Legislation in Respect to the Taxation of Shares of Stock in a local corporation held by nonresidents, by which the nonresident pays a certain tax direct to the state and the resident pays the local tax, is not in conflict with this clause, though in a given year the actual workings of the system may result in a larger burden on the nonresident.

Travellers' Ins. Co. v. Connecticut, (1902) 185 U. S. 371, affirming *State v. Traveler's Ins. Co.*, (1900) 73 Conn. 255. See also *State v. Traveler's Ins. Co.*, (1898) 70 Conn. 590.

Nonresident shareholders of national banks are entitled to the same exemptions and deductions, as against the value of their shares of stock, in ascertaining the taxes due from them, that are granted to resident shareholders, and if the latter show a case of dis-

crimination against them by the state which entitles them to relief in this court, nonresident shareholders in the same bank, who have taken the same necessary measures to protect their right of deduction, will be entitled to the same relief. *Mercantile Nat. Bank v. Shields*, (1894) 59 Fed. Rep. 952. See also *infra*, *Discrimination in Taxation of Personality* — On shares of stock held by nonresidents.

Discrimination in Taxation of Personality. — A state statute the effect of which is to exempt from taxation all the personal estate of a resident of the state, except the excess in value of such estate over debts owing in excess of nontaxable bonds, stocks, and deposits, and to tax a nonresident's property circumstanced the same except that the owner resides out of the state, provides an immunity from taxation to a resident that it denies to a nonresident, discriminates in

favor of the resident and against nonresidents, and denies to citizens of other states an immunity given to its own citizens.

Sprague v. Fletcher, (1896) 69 Vt. 74.

On shares of stock held by nonresidents. — A *Massachusetts* statute providing that every corporation organized under a charter or under general statutes should reserve from each dividend one-fifteenth part of that portion thereof which was due and payable to its stockholders residing out of the commonwealth, and should pay the same as a tax or excise on such estate or commodity to the treasurer of the commonwealth, was held to be an unconstitutional discrimination against nonresidents. *Oliver v. Washington Mills*, (1865) 11 Allen (Mass.) 281, in which case the court said that the *prima facie* discrimination "is not controlled or overcome by the suggestion that shareholders residing in this state are subject to taxation on the value of their shares under the general laws regulating the assessment of taxes, but that the shares of nonresident shareholders are not

liable to be assessed in the ordinary mode. The fact is so certainly. But the reason is that shares in corporations, being personal property, follow the person, and are taxable to the owner in the state where he has his domicile. It cannot be assumed that they are exempt from taxation, or that they are not liable to it, as having a rate of assessment in the place of residence of the owner, as the shares of resident stockholders are subject to it here. Besides, we can see no mode of working out an equation by which an excise of the nature prescribed by the statute can be shown to have any proportion to the tax on the shares belonging to citizens of this commonwealth."

A state statute taxing the shares of nonresidents higher than those of resident citizens violates this clause, and is void for the excess. *Wiley v. Parmer*, (1848) 14 Ala. 627.

d. DISCRIMINATION AS TO COLLATERAL INHERITANCE TAXES. — A state statute provides that "after the passage of this Act, all property which shall pass by will, * * * other than to the use of his or her father, mother, husband, wife, lawful issue, brother, sister, and nieces or nephews, when a resident of this state, * * * shall be and is subject to a tax of five dollars on every one hundred dollars of the market value of such property, * * * for the use of the state; * * * provided, that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax." It was held that the clause "and nieces and nephews when a resident of this state," does not render the statute void, but that, by force of this clause of the Constitution, the immunity of the statute is extended to all citizens of sister states, leaving, as liable for the burden of the tax, the property of all other nephews and nieces, aliens and citizens of the United States, who are not citizens of any particular state.

Matter of Johnson, (1903) 139 Cal. 532, overruling *Matter of Mahoney*, (1901) 133 Cal. 180.

e. METHODS OF ASSESSING AND COLLECTING TAXES. — A statute which directs one manner to be pursued for the ascertainment of the value of taxable property owned by residents, and another manner for the ascertainment of the value of such property when owned by nonresidents, does not amount to a discrimination in favor of the resident citizen.

Redd v. St. Francis County, (1856) 17 Ark. 416.

Methods of collecting special taxes. — An *Arkansas* statute, authorizing the levy of special ditch taxes, does not discriminate against nonresident landowners in providing that

assessments shall be charged against them on the tax books against the lands and collected as other taxes, whereas the assessments against resident landowners are enforced by proceedings in the Circuit Courts. *Cribbs v. Benedict*, (1897) 64 Ark. 563.

3. Discriminating in Favor of Residents of the County. — A statute containing a general prohibition against peddling in a certain county, and exempting from the operation of the Act those who sold only to merchants of the county and

not to their customers, the merchants themselves, and all the citizens of the county who might wish to peddle the products of their own growth or manufacture, secured to residents of the county a practical monopoly of the trade of the county and was held to be invalid.

Com. v. Snyder, (1897) 182 Pa. St. 630.

A Pennsylvania statute providing that "no person or persons shall buy, or barter for, within the limits of the counties of Berks and Franklin, as a hawker or peddler, any butter, eggs, dried fruit, veal, or other article of produce, with intent to send the same for sale or barter to any other market out of the said counties, without first obtaining a license so to do, and paying therefor" to the county treasurer the sum of twenty dollars,

if residing outside the limits of said counties, or ten dollars if residing within said limits, does not violate this clause. The discrimination is not against citizens of other states more than citizens of our own state, nor against foreign markets more than domestic markets; it is directed, not against citizens of other states, but against nonresidents of the county of Berks, and against markets outside of that county. *Rothermel v. Meyerle*, (1890) 136 Pa. St. 251.

4. Regulating and Prohibiting Sale of Intoxicating Liquors. — The regulation of the sale of intoxicating liquors is within the police power of the state, and the traffic is not one of the privileges or immunities of citizenship.

Danville v. Hatcher, (1903) 101 Va. 527. See also *Austin v. State*, (1847) 10 Mo. 591; *State v. Hodgson*, (1893) 66 Vt. 134.

Refusing license to nonresidents. — An *Indiana* statute withholding a license from all persons except male inhabitants of the state is not invalid as denying to citizens of other states the same rights as are enjoyed by the people of Indiana, as the state possesses the power to regulate and control the traffic in intoxicating liquors. *Welsh v. State*, (1890) 126 Ind. 76.

A *Nebraska* statute providing that no license can be issued to any person to sell liquor unless he be a resident of the state, was held to be the exercise of the police power of the state and not for the purpose of revenue or of regulating commerce, and therefore not in violation of this clause. *Mette v. McGuckin*, (1885) 18 Neb. 324.

The *South Carolina Dispensary Act*, prohibiting the manufacture and sale of intoxicating liquors as a beverage within the state, except as therein provided, is valid. As the manufacture and sale can be entirely prohibited, they can be prohibited unless certain

rules are complied with. *Cantini v. Tillman*, (1893) 54 Fed. Rep. 973.

Prohibiting sales of intoxicating liquors to Indians. — A *California* statute providing that every person "who sells or furnishes, or causes to be sold or furnished, intoxicating liquors to any Indian is guilty of a felony," is construed to apply to the Indians as a race, and in its enforcement all inquiry as to the habits or degree of civilization attained by the individual of such race to whom the intoxicating liquor is furnished, or as to whether he is or is not a citizen of the United States is irrelevant; and it does not deprive any citizen of his privileges or immunities. *People v. Bray*, (1894) 105 Cal. 345.

The privilege of buying whiskey at all times and in all places is not one of the rights, privileges, or immunities of citizenship within the meaning of the Constitution, and an Act of Congress prohibiting the sale of liquors to Indian allottees or patentees while the United States holds the title to their lands in trust for them, is constitutional and valid. *Mulligan v. U. S.*, (C. C. A. 1903) 120 Fed. Rep. 99.

5 Keeping Liquors in Possession for Another. — A state statute prohibiting any person, without a license therefor, from keeping in his possession for another spirituous liquors is not a legitimate exertion of the police power, and is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void.

State v. Gilman, (1889) 33 W. Va. 146.

6. Requiring Bond on Sale of Foreign Goods. — A state statute providing that it shall be unlawful for any person to sell or offer for sale any tree, plant, shrub, or vine, not grown in that state, without first filing with the secretary of state an affidavit setting forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principals, and a statement as to where the nursery stock to be sold is grown, together with a

bond to the state in the penal sum of two thousand dollars, conditioned to save harmless any citizen of the state who shall be defrauded by any false or fraudulent representations as to the place where such stock sold by such person was grown, or as to its hardness for climate, is invalid.

In re Schechter, (1894) 63 Fed. Rep. 695, wherein the court said: "When a state undertakes by statutory regulation to deprive citizens of other states who deal in sound articles of commerce produced in other states, of that presumption of honesty and

innocence of wrong which it indulges in favor of the dealers in its own products, and which the law raises in favor of every man, it very effectually deprives the citizens of other states of the most valuable privileges and immunities its own citizens enjoy."

7. Regulating Use of Common Property of the State — a. IN GENERAL. — By this provision the citizens of the several states are not permitted to participate in all the rights which belong exclusively to the citizens of any particular state, merely upon the ground that they are enjoyed by those citizens. And in regulating the use of the common property of the citizens of such state, the legislature is not bound to extend to the citizens of all the other states the same advantages as are secured to its own citizens.

Corfield v. Coryell, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230.

b. FISH AND GAME LAWS — (1) In General. — A state statute regulating the manner and seasons in which hunting and fishing should be pursued in that state, in which the privileges of residents of that state are distinguished from those of nonresidents in that the latter are required to pay a license fee of ten dollars, which fee is not required of residents, is valid.

In re Eberle, (1899) 98 Fed. Rep. 295.

The right to fish in the interior waters of a state is not a privilege to which citizens in the several states are entitled, and the proviso in a *Maine* statute that during February, March, and April, citizens of the state may fish for and take land-locked salmon, trout, and togue, and convey the same to their homes, but not otherwise, is not in conflict with this clause. *State v. Tower*, (1892) 84 Me. 444.

Prohibiting taking of fish by nonresident for manufacture of oil. — A *Virginia* statute making the manufacture of oil and the taking of fish for that purpose by nonresidents in any of the waters of the state unlawful, is valid. *Chambers v. Church*, (1884) 14 R. I. 398, the court saying: "The provision relating to the manufacture of fish oil and manure, in this statute, might, if it stood

alone, come within the doctrine of *Ward v. Maryland*, (1870) 12 Wall. (U. S.) 418, as to restrictions upon trade and business. But it does not. It is a part of the same section which forbids the taking of fish for the purpose of grinding into oil or manure, and is in aid of the latter provision to prevent its evasion. It only forbids the grinding of fish taken in the waters of the state. The object of the law is not to deprive citizens of other states of the right to do business in Virginia, but to protect the fisheries from depletion."

An ordinance "prohibiting all persons from digging clams on Salisbury Flats to sell, except those having a permit from the selectmen, the permit only to be granted to the residents of the town," is not invalid for giving privileges to the inhabitants of the town which are not given to citizens of other states. *Com. v. Hilton*, (1899) 174 Mass. 30.

(2) Oyster Laws — (a) Prohibiting Planting and Taking Oysters. — Citizens of one state are not invested by this clause with any interest in the common property of the citizens of another state, and a state can prohibit the citizens of other states from planting oysters in a navigable stream in that state when its own citizens have that privilege.

McCreedy v. Virginia, (1876) 94 U. S. 394, affirming (1876) 27 Gratt. (Va.) 985.

A *New Jersey* statute under which a vessel found engaged in taking oysters in a river

cove by means of dredges was seized, condemned, and sold, does not violate this clause. *Corfield v. Coryell*, (1823) 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230. See also *Bennett v. Boggs*, (1830) *Baldw.* (U. S.) 60, 3 Fed.

Cas. No. 1,319, as to a New Jersey statute regulating fisheries.

A state statute prohibiting citizens of other states from taking oysters in the navigable waters of the state of *Rhode Island* is valid. *State v. Medbury*, (1855) 3 R. I. 141.

Regulating leases of oyster lands. — A *New Jersey* statute which denies the privilege of

taking a lease of the state lands under water to persons who are not citizens and residents of the state, except those who, at the time of the passage of the Act, were holding and using the state's lands under those waters, and had oysters planted thereon, under a usage, custom, or existing law of the state, does not violate this clause. *State v. Corson*, (1901) 67 N. J. L. 185. See also *Haney v. Compton*, (1873) 36 N. J. L. 509.

(b) **Prohibiting Buying and Selling Oysters in a State.** — An oyster law requiring a license to buy and sell oysters is invalid so far as it forbids the granting of a license to any person who has not been a resident of the state for twelve consecutive months preceding his application for such license.

Booth v. Lloyd, (1887) 33 Fed. Rep. 597.

c. **PROHIBITING NONRESIDENTS GRAZING CATTLE.** — A state statute providing that "it shall be unlawful for a person or persons, not residents of this state, owning in part or in whole any stock whatever, to herd, graze, or permit to run at large any stock whatever in any county or counties of this state; provided, this section shall not be so construed as to prevent stock buyers from gathering up and driving such stock through any counties of this state to market," does no violation to this clause. The state has the right to protect the lands of its citizens against trespass by citizens of another state.

State v. Smith, (1903) 71 Ark. 478.

8. **Right to Sue** — a. **IN GENERAL.** — The intention of this provision was to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state should be entitled to under like circumstances, and this includes the right to institute actions.

Cole v. Cunningham, (1890) 133 U. S. 114. See also *Ward v. Maryland*, (1870) 12 Wall. (U. S.) 430; *Cofrode v. Gartner*, (1890) 79 Mich. 342, and *Mason v. West Branch Boom Co.*, (1858) 3 Wall. Jr. (C. C.) 252, 16 Fed. Cas. No. 9,232, as to right to sue a citizen of the state in the federal courts.

Suspending privilege of prosecuting and defending actions. — A *Minnesota* statute en-

titled "An Act suspending the privilege of all persons aiding the rebellion against the United States, of prosecuting and defending actions and judicial proceedings in this state," was held to be invalid as applied to those who were citizens of other states. *Davis v. Pierse*, 7 Minn. 13. See also *Jackson v. Butler*, 8 Minn. 117; *McFarland v. Butler*, 8 Minn. 116; *Wilcox v. Davis*, 7 Minn. 23.

b. **RIGHT TO ENFORCE A LIABILITY.** — A bill enacting that "all * * * conveyances, mortgages, etc., which either in whole or in part shall have been for or on account of spirituous or intoxicating liquors, shall be utterly null and void against all persons and in all cases," and "no action of any kind shall be maintained in any court in this state either in whole or in part for intoxicating or spirituous liquors sold in any other state or country whatever," if passed, would be invalid, as a refusal to pay a debt is an injury to the property of the creditor, and when the right to remedy for such injury is secured to the citizens of the state by the state constitution, the United States Constitution gives the same privilege to the citizens of the different states.

Opinion of Justices, (1852) 25 N. H. 537.

Right of personal representatives to enforce liability.—A statute which provides that "if the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroads, or by the unfitness or negligence or carelessness of their servants

or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue," should be construed as confirming the right on the remedy therein given to personal representatives appointed by the courts of that state. *Marvin v. Maysville St. R., etc., Co.*, (1892) 49 Fed. Rep. 436.

c. RIGHT OF NONRESIDENT TO SUE NONRESIDENT — (1) *In General.* —

A resident of another state has the same right to bring an action in the courts of a state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of the state has.

Eingartner v. Illinois Steel Co., (1896) 94 Wis. 78. See also *Barrell v. Benjamin*, (1819) 15 Mass. 354.

This provision gives a citizen of a state the right to maintain an action to recover a legal demand or equitable right against a person found in a state of which he is not a citizen. *Steed v. Harvey*, (1898) 18 Utah 372, wherein the court said: "This is a general description of the rights guaranteed by the Constitution of the United States to the citizens of each state in the several states, under their laws respectively, without enumerating them. Undoubtedly a citizen of a state may acquire and claim rights under the laws of another state without going into it. He may enter into contracts to be executed in another state, and may acquire and own property, personal and real, situated therein by purchase, bequest, or inheritance; and he may engage in lawful commerce, trade, and business therein, and such property is exempt from any higher taxes than are imposed by the state on its own citizens, and he has

a right to employ the remedies the laws of such state provide for the enforcement of his contracts, the redress of wrongs, and the protection of his rights; he is entitled to the same protection of life, liberty, and property the laws of such state extend to its own citizens. The privileges and immunities of a citizen of one state in another state include these rights with others. There are privileges, however, which states give only to their own citizens, rights which they will not permit citizens of other states to acquire and possess, such as the elective franchise, the right to sit upon juries, the right to hold public office. These rights they make dependent on citizenship."

Right to sue out attachment.—A citizen of a state has a right to institute actions of any kind in the courts of another state, and this includes the right to sue out an attachment in another state on the property within that state of a nonresident. *Morgan v. Neville*, (1873) 74 Pa. St. 57.

(2) *Right of Nonresident to Sue Foreign Corporation.* — A state statute under which a resident of the state, or a domestic corporation, can maintain an action against a foreign corporation for any cause, no matter where it arose, but an action by a nonresident plaintiff against a foreign corporation can be maintained only in the cases specified, and in no case for a cause of action which arose outside of the state limits, does not conflict with this clause.

Robinson v. Oceanic Steam Nav. Co., (1889) 112 N. Y. 323, *affirming* (1888) 56 N. Y. Super. Ct. 108. See also *Anglo-American Provision Co. v. Davis Provision Co.*, (1902) 160 N. Y. 506; *Duquesne Club v. Penn Bank*, (1885) 35 Hun (N. Y.) 390.

A South Carolina statute provides that "an action against a corporation created by or under the laws of any other state, government, or country may be brought in the Circuit Court (1) by any resident of this state, for any cause of action; (2) by a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated, within this state." The sole object of this provision was to limit the cases in which a

nonresident might sue a foreign corporation in the courts of the state, and the two classes mentioned in the second subdivision of the section, namely, to cases in which the cause of action has arisen in the state or to cases in which the subject of the action shall be situated within the state. As so construed, the statute does not violate this clause. By the express terms of this clause of the Constitution the privileges and immunities secured are to the citizens of other states, and the provisions of the statute under consideration relate only to residents—two different and distinct things—and hence there is no conflict. *Central R., etc., Co. v. Georgia Constr., etc., Co.*, (1889) 32 S. Car. 319.

d. ATTACHMENT AGAINST NONRESIDENTS — (1) In General. — A statute providing for the issuance of an attachment against a nonresident is not in conflict with this clause.

Pyrolusite Manganese Co. v. Ward, (1884) 73 Ga. 491. See also *Campbell v. Morris*, (1797) 3 Har. & M. (Md.) 535.

A New York statute abolishing imprisonment for debt in this state, provides that no person shall be arrested on civil process in suits brought upon contracts express or implied, except in cases where the defendant "shall not have been a resident of this state for at least one month previous to the commencement of a suit against him." The privilege from arrest does not depend upon

citizenship or domicile, any further than they may include residence, but upon residence. The idea of the statute was to limit the privilege to debtors living permanently in the state for the time being, which it was presumed would generally bring their property within the reach of execution, or enable the creditor to apply any other coercive measure in the collection of his debt which the laws have provided, and as so construed it is valid. *Frost v. Brisbin*, (1837) 19 Wend. (N. Y.) 11.

(2) Attachment of Property of Nonresident. — A state statute providing "that when any person, who shall be an inhabitant of any other government, so that he cannot be personally served with process, shall be indebted to any person, resident of this state, and hath any estate within the same, any of the judges or justices may grant an attachment against the estate of such foreign person; and in case of the death of any debtor residing without the limits of this state, the creditor, resident within the state, shall in like manner be entitled to recover, by attachment, against the executor or administrator of such nonresident," is not incompatible with this clause.

Kincaid v. Francis, (1812) Cooke (Tenn.) 50, wherein the court said: "The object of the Constitution was to secure to the citizens of every state an equal administration of justice as it regarded their essential rights, either of property or person, by the courts of every state, and was not at all intended to interfere with the mode of prosecuting those rights. This seems to have been the understanding of several states, as some of them have passed such discriminating laws; for instance, in Kentucky, a nonresident is compelled to give security for costs before he can commence a suit of any description, whereas the citizens of the state are under no such necessity."

Attachment against nonresident executor. — A Kansas statute authorizing the enforcement of a contract obligation of a nonresident who died owning real estate in Kansas, by attachment and sale of such real estate in an action brought against the nonresident executor, does not deny to nonresidents the

privileges and immunities of citizens of the state, within the meaning of this clause. *Manley v. Mayer*, (1904) 68 Kan. 377. See also *Manley v. Osborne*, (Kan. 1904) 76 Pac. Rep. 1130.

Without undertaking. — A Nebraska statute providing that "where the ground of attachment is that the defendant is a foreign corporation, or a nonresident of the state, the order of attachment may be issued without an undertaking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by the attachment if the order be wrongfully obtained," is not in conflict with this clause. *Marsh v. Steele*, (1879) 9 Neb. 100. See also *Olmstead v. Rivers*, (1879) 9 Neb. 234.

9. Service of Process. — A statute provided that "in actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent or person in charge of such business in this state in the county where the business is carried on, or in the county where the cause of action occurred." A judgment *in personam* obtained against a nonresident on a service made on an agent under the statute violates the rights of the defendant by depriving him of an immunity or exemption allowed to citizens of the state, as the citizens of

that state have entire immunity from being subjected to personal judgments for money upon such a service of process in actions at law.

Moredock v. Kirby, (1902) 118 Fed. Rep. 182.

Service on agent of nonresident. — A *Delaware* statute providing "that whenever suit shall be brought against any person or persons not residing in this state, but doing business therein either by a branch establishment or agency, it shall be sufficient service of a writ of summons to leave a copy thereof with any agent, or at the usual place of business of such person or persons, or his or her or their agent ten days before the return thereof," so far as it was applicable to the case, was held to be in violation of this clause. *Caldwell v. Armour*, (1899) 1 Penn. (Del.) 545.

By publication — when property within the state. — Statutes providing for service by

publication on nonresidents, those whose residence is unknown, or those who have been absent from the state, or who conceal themselves so that service cannot be had upon them, are not objectionable as depriving nonresidents of privileges and immunities of the citizens of the state. It is beyond the power of a state to grant the same privileges and immunities in the matter of service of process to those outside of its jurisdiction as it can to those within its limits; its powers are limited by its boundaries. All residents, or those found within its limits, are to be served personally. All others who cannot be so reached must necessarily be served by publication, both methods being regardless of their citizenship. *Morris v. Graham*, (1892) 51 Fed. Rep. 57; which was an action to remove a cloud on title to land lying within the state.

10. Requiring Security for Costs. — A statute and rule of court requiring a nonresident plaintiff to enter security for costs of the action does not conflict with this clause. The security for costs is required of a party, not because he is a citizen of another state, but only because he is a nonresident of the state. The requirement would apply as well to a citizen of the state, who was a nonresident at the time, as it would to a citizen of another state not residing in the enacting state; and so, on the other hand, if a citizen of another state is residing in the enacting state at the time, he could no more be required to enter security for costs than a citizen of the latter state under like circumstances.

Cummings v. Wingo, (1889) 31 S. Car. 434. See also *Blake v. McClung*, (1898) 172 U. S. 256; *Kilmer v. Groome*, (1897) 19 Pa. Co. Ct. 339.

A *Maryland* statute requiring nonresident plaintiffs to give security for costs is constitutional. *Haney v. Marshall*, (1856) 9 Md. 194, in which case the court said: "The Act has been in operation for more than half a century, during all which time it has been recognized by the profession, both on the bench and at the bar, as a valid law; its

constitutionality never before having been questioned; and at this late day we are not disposed to declare it a nullity. In aid of the correctness of such a decision, we would refer to the 83d, 91st, and 92d rules of the Circuit Court of the United States for the Maryland District, in which the principle of this Act is adopted; which rules were made and established by the judges of that court at November term, 1802." See also *Holt v. Tennallytown, etc., R. Co.*, (1895) 81 Md. 219.

11. Statute of Limitations. — A state statute of limitation which provides that when the defendant is out of the state the statute shall not run against the plaintiff if the latter resides in the state, but shall if he resides out of the state, is not repugnant to this clause.

Chemung Canal Bank v. Lowery, (1876) 93 U. S. 76.

As applied to a promissory note executed

in another state, a statute of limitations does not violate this clause. *Higgins v. Graham*, (1904) 143 Cal. 131.

12. Giving Resident Creditors Priority — *a. IN GENERAL.* — A state statute, the manifest purpose of which is to give to all creditors who are citizens of the state priority over all creditors residing out of that state, whether the latter

were citizens or only residents of some other state or country, infringes rights given by this provision.

Blake v. McClung, (1898) 172 U. S. 247. See also Blake v. McClung, (1900) 176 U. S. 59. But see Douglass v. Stephens, (1821) 1 Del. Ch. 467, wherein it was held that a Delaware statute giving a preference to creditors within the state was not incompatible with this clause. "The privileges designed to be secured cannot be construed to be any right which a creditor has to recover a debt from the administrator of a deceased person. This must depend on the laws of each state. It is neither a right nor a privilege which, according to the words of the section, the citizens of each state are entitled to in the several states."

A Michigan statute, amending the general building association law, provided that "the secretary of state may at any time, for reasonable causes, with the concurrence of the attorney-general, revoke the authority of any foreign corporation to do business in this state; and in such event the attorney-general shall take proceedings to wind up the business of such foreign corporation in this state, and a receiver may be appointed for the assets of such foreign corporation in this state. Stockholders and creditors in this state of such foreign corporation shall have a first lien on all assets in this state of such foreign corporation, and the business in this state of such foreign corporation shall be

closed by such receiver, and its assets converted into money, to satisfy the claims of such stockholders and creditors." In its operation against the other shareholders of such an association, residents and citizens of other states than Michigan, the statute is invalid. Had the legislation of Michigan provided that, as a condition of the defendant association's doing business in the state of Michigan, it should deposit a fund with the state treasurer or other state officer to be used for the security of resident stockholders or creditors of the state of Michigan, such a provision would not have been in violation of the fourth article of the Federal Constitution. Maynard v. Granite State Provident Assoc., (C. C. A. 1899) 92 Fed. Rep. 435.

Whether an Indiana statute, which provides: "and the citizens of this state shall have a lien upon all the personal property of said corporations, to the amount of \$100, for all debts originally contracted within this state, which, after said lien of the state, shall take precedence of all other debts, demands, judgments or decrees, liens or mortgages against such corporations," is invalid by reason of repugnancy to this clause, *quære?* Brown v. Ohio Valley R. Co., (1897) 79 Fed. Rep. 176.

b. REQUIRING DEPOSIT FOR SECURITY OF RESIDENT CREDITORS. — As a condition precedent to the right to transact business in the state of New York, a New Hampshire corporation, by the laws of the state of New York, was obliged to make a deposit in the nature of a fund to be held in trust for the benefit of domestic creditors and shareholders. It was held that the corporation making the deposit must be deemed to have consented that, in case of insolvency, the fund be distributed according to the terms of the statute, and that the application of the fund to the benefit of domestic creditors and shareholders did not infringe upon the provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

People v. Granite State Provident Assoc., (1900) 161 N. Y. 496, *affirming* (1899) 41 N. Y. App. Div. 257. See also Maynard v.

Granite State Provident Assoc., (C. C. A. 1899) 92 Fed. Rep. 435, noted *supra*.

13. Right to Hold Property as Trustee. — A statute providing that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing, (except wills) for any purpose whatever, who shall not be at the time a *bona fide* resident of the state of Indiana; and it shall be unlawful for any person who is not a *bona fide* resident of the state to act as such trustee," is a plain discrimination against the residents of other states, and is void. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any state of the Union, nor can he be denied the right

to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others.

Farmers' L. & T. Co. v. Chicago, etc., R. Co., (1886) 27 Fed. Rep. 148. See also *Shirk v. La Fayette*, (1892) 52 Fed. Rep. 858; *Roby v. Smith*, (1891) 131 Ind. 344.

14. Assignee for Benefit of Creditors to Be a Resident.—A state statute providing that all voluntary assignments for the benefit of creditors shall be void unless the assignee shall be a resident of the state is valid.

Duryea v. Muse, (1903) 117 Wis. 403. See also *Vanbuskirk v. Hartford F. Ins. Co.*, (1842) 14 Conn. 590.

15. Recording Assignments for Benefit of Creditors.—A state statute providing for the recording in that state of assignments for the benefit of creditors made by persons residing out of the state as affording protection to domestic creditors alone was held to be valid.

Hilliard v. Enders, (1900) 196 Pa. St. 592.

16. Discriminating Against Individuals Transacting Insurance.—A state statute which prohibits the writing of insurance by an individual acting as agent for a number of citizens of another state, not a partnership and not incorporated, who have not complied with the requirements of the statute, when the citizens of the state may, with restrictions, enter into contracts of insurance, abridges the privilege freely allowed to its own citizens.

Barnes v. People, (1897) 168 Ill. 426. The court said: "If, as contended, the provision is intended as a police regulation for the protection of the citizens of this state from irresponsible underwriters acting individually and without incorporation or organization under any law, the same necessity applies in the case of the irresponsible and conscienceless underwriter who is a citizen of this state. If the business of insurance, on account of its importance and nature, is a proper subject for the exercise of the police power, such power must extend to and operate upon the citizens of this state and other states equally. A discrimination directed only against underwriters residing without the state is invalid."

A Florida statute requires that before any company, association, firm, or individual not of the state shall transact any business of insurance in the state, it or he shall be possessed of at least one hundred and fifty thousand dollars in value invested in United States or state bonds, or other tangible interest-bearing stock issued in the United States at their market value, without making such requirement as to unincorporated associations, firms, or individuals of the state, and to this extent the Act is discriminative as to citizens of other states and of no effect. *State v. Insurance Com'rs*, (1896) 37 Fla. 564.

17. Right of Dower.—The right of dower in lands within a state, while it remains inchoate—a mere expectancy—and until it becomes consummated by the husband's death, is under the absolute control of the state legislature, subject to the limitation that there can be no distinction "between resident aliens and citizens;" but this does not prevent discrimination against those who are neither citizens nor residents, and such discrimination is not in conflict with this clause.

Bennett v. Harms, (1881) 51 Wis. 260.

Conveyance of dower.—A *Kansas* statute respecting the setting apart of dower, which provides "that the wife shall not be entitled to any interest, under the provisions of this section, in any land to which the husband has made a conveyance when the wife, at the time of the conveyance, is not or never has been a resident of this state," does not violate this clause. *Buffington v. Grosvenor*,

(1891) 46 Kan. 732, in which case the court said: "It is competent for the legislature of each state to declare the mode and manner by which real property situate within the state may be transferred by the husband or by the husband and wife, or by a judgment and process of court, so as to divest the husband or husband and wife of all estate or interest therein, and also to provide for the distribution of and the right of succession to the estate of deceased persons."

18. Communal Rights of Property in Louisiana — The laws of Louisiana provide that a contract of marriage made in that state, or the residence of persons there in the relation created by marriage, shall give rise to certain communal rights on the part of each in property acquired in that state during the marriage. A further law, leaving the rights of nonresident married persons in respect to property in Louisiana to be governed by the laws of their domicile, does not deprive a wife of her rights as a citizen, in property acquired by the husband during marriage in Louisiana.

Conner v. Elliott, (1855) 18 How. (U. S.) 593.

19. Regulating Practice of Medicine. — A statute provides for the issue of license to practice medicine, etc., to three classes of applicants, and the proof of qualification to be produced by each class, as follows: (1) the affidavit of the applicant, stating that he or she has regularly graduated in some reputable medical college, and the exhibition to the proper clerk of his or her diploma; (2) the affidavits of the applicant and of two reputable freeholders or householders of the county, stating that such applicant had resided and practiced medicine, etc., in the state continuously for ten years immediately prior to the taking effect of such act; (3) the affidavits of the applicant and two reputable freeholders or householders of the county, stating that he or she had resided and practiced medicine, etc., in the state, continuously for three years immediately prior to the taking effect of such act, and that he or she had, prior to that date, attended one full course of lectures in some reputable medical college. The statute is not invalid as granting special privileges to the citizens of the state not given to citizens of other states.

State v. Green, (1887) 112 Ind. 468. See also the following cases:

Colorado. — *Harding v. People*, (1887) 10 Colo. 390.

Michigan. — *People v. Phippin*, (1888) 70 Mich. 6.

Montana. — *Craig v. Medical Examiners*, (1892) 12 Mont. 208.

An Ohio statute, the provisions of which make it necessary for the person obtaining a certificate from the medical board to leave it with the probate judge of the county in which he resides to entitle him to practice, a requirement with which it is impossible for nonresidents to comply, and by which physicians residing in other states and territories are prohibited from opening offices or appointing places to meet patients or receive calls within the state, and which restricts their right to practice in that state to cases in which they may be called in consultation with a local practitioner of the state, or where, residing on the border of a neighboring state their practice extends into that state, is not void for discriminating against physicians and surgeons who reside out of the state solely on account of their residence and not for the lack of necessary qualification. *France v. State*, (1897) 57 Ohio St. 20. See also *State v. Ottman*, (1897) 6 Ohio Dec. 265.

An Oregon statute which provides that every practitioner of medicine and surgery, to entitle him to practice his profession, is required to obtain a certificate from the state

board of examiners that he is a graduate of a medical institution in good standing; or if he is not a graduate, that he has been found, upon examination by the board, to be qualified to practice medicine or surgery; or that he was a practitioner of medicine or surgery, and was so engaged at the passage of the Act; and also provides that any person practicing medicine or surgery without obtaining such certificate shall be deemed guilty of a misdemeanor, and shall be punished by a fine or imprisonment or both in the discretion of the court, was held to be valid. *State v. Randolph*, (1892) 23 Oregon 80.

A Washington statute requiring an applicant for license to practice medicine to submit to the prescribed tests to show the necessary qualifications, is valid. *State v. Carey*, (1892) 4 Wash. 429, in which case the court said: "The test may not be the best that could have been devised; it may be exceedingly imperfect and faulty, and in some respects we think it is, as it is difficult to see how a practitioner's qualifications can be affected by the mere accident of his residence in the state at the time of the passage of the law, or why the community should not be protected from resident as well as nonresident charlatans and quacks. Yet, conceding the right of the legislature to legislate upon the subject, the wisdom of the Act, its reasonableness or unreasonableness is a question for legislative discretion, and not for judicial determination."

20. Regulating Practice of Dentistry. — A state statute entitled "An Act to regulate the practice of dentistry, and punish violators thereof," was held not to violate this clause. No distinctions are made between citizens of that and other states; there is no discrimination between graduates of dental colleges in that state and those graduated from colleges located in other states or in foreign countries; nor are higher qualifications required nor any different test of competency prescribed, nor any higher charge for a certificate imposed on one who came into the state after the law was enacted, than was required of or imposed on one who resided in that state at that time, but was not engaged in the practice of dentistry.

State v. Creditor, (1890) 44 Kan. 565.

21. Discrimination in Favor of Local Freight Rates. — A discrimination in rates between local freight and that which is extraterritorial when it commences its transit is not prohibited by this clause. It is not a personal distinction.

Shipper v. Pennsylvania R. Co., (1864) 47 Pa. St. 338.

22. Discriminating Wharfage Rates. — A state statute fixing the rates of wharfage which makes a discrimination in favor of the canal navigation of the state, but makes none in favor of the citizens of the state, is not invalid. The discrimination is between the employment of the boats, not between the persons owning or navigating the boats. All persons, without regard to citizenship, are placed upon the same footing, and it cannot be said that the statute, either in its language or its results, creates a discrimination in favor of the citizens of the state.

The Canal-Boat Ann Ryan, (1873) 7 Ben. (U. S.) 20, 1 Fed. Cas. No. 428.

23. Prescribing Fees of Harbor Master. — A statute establishing the office of harbor master for the port of Pensacola provides "that the harbor master shall have power to demand and receive from the commanders, owners, or consignees, or either of them, of every vessel that may enter the port of Pensacola and load or unload, or make fast to any wharf, the following fees, viz.: For any vessel drawing less than ten feet, the sum of five dollars; and for any vessel drawing more than ten feet, the sum of one dollar for each additional foot: Provided, this section shall not extend to flats, keelboats, steamboats, or other vessels regularly employed in the trade between the port of Pensacola and the ports in the states of Alabama, Louisiana, and Texas." The Act, discriminating as it does against the ports of several states by imposing the burden of supporting the port warden of that port upon the commerce of foreign countries and of other states of the Union, excepting the favored states of Alabama, Louisiana, and Texas, is partial and unequal, contrary to the spirit at least of the provision of the Constitution, which secures to the citizens of each state all the privileges and immunities of citizens in the several states.

Webb v. Dunn, (1882) 18 Fla. 721.

24. Prohibiting Persons from Assuming Title of Port Warden. — A statute entitled "An Act to forbid the assumption of the title of port warden by persons

not duly appointed," was held to be valid as applied to a resident of the state of New Jersey appointed a port warden of the state of New Jersey by the governor of that state, who exercised his powers of port warden of that state in his place of business in the city of New York.

Curtin v. People, (1882) 26 Hun (N. Y.) 564, *affirmed* (1882) 89 N. Y. 621.

25. Inspection of Vessels of Nonresidents. — A statute providing protection for the slave property of the state, and requiring vessels about to depart from the state to undergo an inspection, enacted in part that "it shall not be lawful for any vessel of any size or description whatever, owned in whole or in part by any citizen or resident of another state, and about to sail or steam from any port," etc. The statute was held to be applicable to vessels owned by the citizens of other states or by citizens of the enacting state who had abandoned their residence in that state, and not to violate this clause.

Baker v. Wise, (1861) 16 Gratt. (Va.) 219.

26. Capias Against Nonresident. — A state statute making a discrimination between citizens of the state and citizens of other states, in respect to the issuing of a writ of capias ad respondendum against a citizen of another state while temporarily within the state, is invalid.

Black v. Seal, 6 Houst. (Del.) 541.

27. Tax on Emigrant Agents. — A state statute taxing the business of hiring persons to labor outside the state limits does not violate this clause, as there is no discrimination between the citizens of other states and the citizens of that state.

Williams v. Fears, (1900) 179 U. S. 274, *affirming* (1900) 110 Ga. 584.

A North Carolina statute imposing a tax

on "every emigrant agent or person engaged in procuring laborers to accept employment in another state," is constitutional. *State v. Hunt*, (1901) 129 N. Car. 686.

28. Legislation Against Diseased Animals. — A statute which provides that any person who has in his possession in that state any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread Texas fever, does not deny any rights and privileges to citizens of other states which are accorded to citizens of that state.

Kimmish v. Ball, (1889) 129 U. S. 222.

A statute concerning the appointment of a sheep inspector declaring it to be unlawful to bring sheep into the state without first having them dipped as provided by the statute, dis-

criminates to such an extent against persons who may desire to bring sheep into the state and those who may have sheep within the state as to be clearly repugnant to this clause. *State v. Duckworth*, (1897) 5 Idaho 642.

29. Settlement of Insane Pauper. — This clause does not authorize a board of directors of an infirmary of a county in Ohio to compel by mandate the sheriff of a county in Indiana to receive an insane pauper that such sheriff has secretly conveyed to and released in the Ohio county.

State v. Overman, (1901) 157 Ind. 141.

30. Sale of Pistols. — A statute which makes it a misdemeanor for any person to sell a dirk or bowie-knife, a sword or a spear in a cane, brass or metal knucks, or any pistol except such as is used in the army and navy of the United States and known as the navy pistol, is valid, and a person convicted for selling a pocket pistol has not been denied any constitutional right.

Dabbs v. State, (1882) 39 Ark. 355.

31. Sequestrating Property of Alien Enemy During Insurrection. — This provision condemns as utterly void an Act passed by the Confederate Government, and enforced by a state as a law of that commonwealth, sequestrating the property held by any alien enemy.

Williams v. Bruffy, (1877) 96 U. S. 184, wherein the court said: "This provision has been held, in repeated adjudications of this court, to prohibit discriminating legislation by one state against the citizens of another

state, and to secure to them the equal protection of its laws, and the same freedom possessed by its own citizens in the acquisition and enjoyment of property."

32. Slaves Voluntarily Taken into a Free State. — An owner could not take a slave into a non-slaveholding state except under the condition prescribed by a statute, that on so doing the slave should immediately become free.

Lemmon v. People, (1860) 20 N. Y. 611.

33. Right to Purchase and Export Slaves. — A state statute declaring "that if any person or persons, being the owner or owners of any slave or slaves, his agent or factor, shall, after the passing of this Act, export or sell with an intent for exportation, or carry out for sale, from this state, any negro or mulatto slave without a license or permit as aforesaid first had and obtained from the justices of the court aforesaid, every such negro or mulatto slave so exported, or sold with an intention for exportation or carried out for sale. is hereby declared free, and entitled to enjoy all the privileges that a free negro or mulatto may or can do within this state," was held to be valid.

Allen v. Negro Sarah, (1838) 2 Harr. (Del.) 437, wherein the court said that a citizen of another state becoming entitled to

property acquires and must hold it according to the laws of the state.

ARTICLE IV., SECTION 2.

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."¹

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I. CHARGED IN ANY STATE AND FOUND IN ANOTHER STATE—1. *Territories*.—

Although the constitutional provision in question does not, in terms, refer to fugitives from the justice of any state, who may be found in one of the territories of the United States, the Act of Congress has equal application to that class of cases, and the words "treason, felony, or other crime," must receive the same interpretation, when the demand for the fugitive is made, under that Act, upon the governor of a territory, as when made upon the executive authority of one of the states of the Union.

Ex p. Reggel, (1885) 114 U. S. 650.

While this clause does not authorize Congress to provide for the return of a fugitive from justice on the demand upon the governor of a state by the chief executive of a territory, such authority may be found in the section of this article of the Constitution giving to Congress power to make all needful rules and regulations respecting the territory or other property belonging to the United States. *Ex p. Morgan*, (1883) 20 Fed. Rep.

303, wherein the court said that the word "state" has a definite, fixed, certain, legal meaning in this country and under this form of government, and "means one of the commonwealths or political bodies of the American Union, and which, under the Constitution, stand in certain specified relations to the national government, and are invested as commonwealths with full power, in their several spheres, over all matters not expressly inhibited."

¹ Questions relating to foreign extradition are treated under the provision of Art. II., section 2, that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur, p. 27 *et seq.* See also sections 5270 *et seq.*, R. S., title *Extradition*, 3 FED. STAT. ANNOT. 68.

For the statutes relating to interstate extradition, see sections 5278 *et seq.*, R. S., title *Extradition*, 3 FED. STAT. ANNOT. 78.

2. District of Columbia. — Though the District of Columbia is not included within the constitutional provision, persons charged with having committed offenses in the District may be arrested wherever found and returned to the District for trial, under section 1014, R. S.

Price v. McCarty, (C. C. A. 1898) 89 Fed. Rep. 84; *In re Cross*, (1884) 20 Fed. Rep. 824; *In re Buell*, (1875) 3 Dill. (U. S.) 116, 4 Fed. Cas. No. 2,102; *Matter of Dana*, (1873) 7 Ben. (U. S.) 1, 6 Fed. Cas. No. 3,554. See section 1014, R. S., title *Crimes and Offenses*, 2 FED. STAT. ANNOT. 321.

3. Indian Nations. — The Cherokee Nation is neither a state nor a territory in the sense to be attached to the words when used in the Constitution.

Ex p. Morgan, (1883) 20 Fed. Rep. 304, holding that the governor of a state could not honor the requisition of the principal chief of the Cherokee Nation.

II. "TREASON, FELONY, OR OTHER CRIME." — The words "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as treason and felony.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 99. See *Matter of Hughes*, (1867) Phil. L. (61 N. Car.) 57.

It is questionable whether the states could

constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. *Lascelles v. Georgia*, (1893) 148 U. S. 543.

Every Violation of Criminal Laws. — Every violation of the criminal laws of a state is within the meaning of the Constitution, and may be made the foundation of a requisition.

Taylor v. Taintor, (1872) 16 Wall. (U. S.) 375.

Political Offenses. — The words "treason and felony" were introduced for the purpose of guarding against any restriction of the word "crime," and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the states of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the state, as well as all other crimes.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 99.

III. NECESSITY OF LEGISLATION BY CONGRESS. — There is no express grant to Congress of legislative power to execute this provision, and it is not, in its nature, self-executing; but a contemporary construction, contained in the Act of 1793, 1 Stat. L. 302, ever since continued in force, and now embodied in sections 5278 and 5279 of the Revised Statutes, has established the validity of its legislation on the subject.

Roberts v. Reilly, (1885) 116 U. S. 94.

Here is no giving up of the right under international law as between the states in respect to the crimes for which the person delivered may be tried. The right to demand is conferred, and the duty to deliver is imposed; the rest remains as if settled by treaty between the states as nations. The laws of the United States do no more than to pre-

scribe details for carrying out this provision. *In re Fitton*, (1891) 45 Fed. Rep. 472.

Upon this provision and the statutory law of the United States rest exclusively the right of one state to demand, and the obligation of the other state upon which the demand is made to surrender, a fugitive from justice. *Lascelles v. Georgia*, (1893) 148 U. S. 541.

IV. POWER OF STATES TO LEGISLATE. — While legislation by a state against the Constitution and the law of Congress, impairing the full obligation of their provisions, would be nugatory, yet it is competent for a state legislature to enact laws on the subject, provided that such enactments are not inconsistent with the end named in the Constitution.

Kurtz v. State, (1886) 22 Fla. 42; *Matter of Perkins*, (1852) 2 Cal. 434.

An *Ohio* statute to regulate the practice of the delivery of fugitives from justice when demanded by another state or territory was held to be valid in so far as its operation was not in conflict with the laws of Congress. While it is not within the power of the state legislature to make provisions in conflict with the laws of Congress on the subject, state legislation in aid of congressional enactment is not objectionable. When the means by which the fugitive is "to be arrested and secured" are not provided by an Act of Congress, the legislature of a state may and should provide proper and adequate means and facilities for the accomplishment of such extradition. *Ex p. Ammons*, (1878) 34 Ohio St. 518.

State legislation to supply an omission, or in aid of a law of Congress, is valid and binding. *Coffman v. Keightley*, (1865) 24 Ind. 509. See also *Robinson v. Flanders*, (1867) 29 Ind. 14; *State v. Moore*, (1855) 6 Ind. 436; *Com. v. Hall*, (1857) 9 Gray (Mass.) 262; *Com. v. Tracy*, (1843) 5 Met. (Mass.) 536.

Providing for arrest before demand. — It is competent for a state to provide by statute for the arrest and detention of a fugitive from justice until his surrender shall be demanded in accordance with the Constitution and laws of the United States. *Ex p. Rosenblat*, (1876) 51 Cal. 285; *Ex p. Cubreth*, (1875) 49 Cal. 435; *Ex p. White*, (1875) 49 Cal. 434; *Kurtz v. State*, (1886) 22 Fla. 36.

V. POWER OF GOVERNOR — 1. To Make Demand. — The governor of a state is not authorized to make a demand unless the party is charged in the regular course of judicial proceedings.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 104, wherein the court said: "The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The governor of the state could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our insti-

tutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department."

2. To Issue Warrant of Arrest. — The governor of a state where a fugitive is found cannot lawfully issue a warrant of arrest without a law of the state or an Act of Congress to authorize it.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 104.

The power of interstate extradition cannot be exercised by the chief executive of a state on the ground of comity or public pol-

icy. Not only the power, but the manner of its exercise, is based exclusively on the Constitution of the United States, and the law of Congress passed in pursuance thereof. *Ex p. Morgan*, (1885) 20 Fed. Rep. 301.

VI. ABSOLUTE RIGHT TO DEMAND AND CORRELATIVE DUTY TO SURRENDER. —

This clause gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; the right given to "demand" implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled.

Kentucky v. Dennison, (1860) 24 How. (U. S.) 103.

"Whether Congress might not provide for the compulsory restoration to the state of parties wrongfully abducted from its territory upon application of the parties, or of the state, and whether such provision would

not greatly tend to the public peace along the borders of the several states, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided." *Mahon v. Justice*, (1888) 127 U. S. 705.

VII. DELIVERY UP ON SWORN COMPLAINT. — The delivery up of an alleged fugitive from justice against whom a complaint for the crime of securing property by false pretenses has been sworn to and is pending before a justice of the peace of the state having jurisdiction conferred upon him by the laws of that state, is authorized, in view of the provisions of this clause, and section 5278, R. S., in so far as it authorizes the delivery up of an alleged fugitive upon such an affidavit, is valid.

Matter of Strauss, (1905) 197 U. S. 325.

VIII. REMOVED BY ABUSE OF LEGAL PROCESS OR KIDNAPPED. — Except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a state for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process.

Lascelles v. Georgia, (1893) 148 U. S. 543.

IX. TRIAL FOR OTHER OFFENSE THAN STATED IN REQUISITION. — Upon a fugitive's surrender to the state demanding his return in pursuance of national law, he may be tried in the state to which he is returned for any other offense than that specified in the requisition for his rendition, and in so trying him against his objection no right, privilege, or immunity secured to him by the Constitution and laws of the United States is thereby denied.

Lascelles v. Georgia, (1893) 148 U. S. 540.

X. WRITS OF HABEAS CORPUS. — The Courts of the United States Have Jurisdiction, on habeas corpus, to discharge from custody a person who is restrained of his liberty, in violation of the Constitution or laws of the United States, although he may be held under state process for an alleged offense against the laws of

such state. The right of one state of the Union to demand from another the delivery of a person who has fled from justice depends upon the Constitution of the United States, and the mode of proceeding and the evidence necessary to support such demand are prescribed by the statutes of the United States. It therefore follows that, when the executive of a state, upon whom a demand has been made for the surrender of a fugitive from justice, causes, by virtue of his warrant, the arrest of the person charged as a fugitive from the justice of another state, the prisoner is in custody under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of its courts as to the legality of his arrest.

Ex p. Dawson, (C. C. A. 1897) 83 Fed. Rep. 306.

It is competent for a federal court to issue a writ of habeas corpus, because Congress has given jurisdiction to the courts and judges of

the United States to issue such writs in cases of prisoners who are in jail or in custody in violation of the Constitution or any law of the United States. *Ex p. McKean*, (1878) 3 Hughes (U. S.) 23.

It Is Competent for the Courts of a State, or for any of her judges having power, under her laws, to issue writs of habeas corpus, to determine, upon writ of habeas corpus, whether the warrant of arrest and the delivery of the fugitive to the agent of the demanding state were in conformity with the statutes of the United States; and if so, to remand him to the custody of the agent of that state.

Robb v. Connolly, (1884) 111 U. S. 639.

Whenever the executive of a state, upon whom such a demand has been made, by virtue of his warrant, causes the arrest for delivery of a person charged as a fugitive from the justice of another state, the prisoner is held in custody only under color of authority derived from the Constitution and laws of the United States, and is entitled to invoke the judgment of the judicial tribunals, whether of the state or of the United States, by the writ of habeas corpus, upon the law-

fulness of his arrest and imprisonment. The jurisdiction of the courts of the states is not excluded in such cases, as was adjudged by this court in the case of *Robb v. Connolly*, (1884) 111 U. S. 624, for, although the party is restrained of his liberty under color of authority derived from the laws of the United States, he is not in the custody of, or under restraint by, an officer of the United States. *Roberts v. Reilly*, (1886) 116 U. S. 94. See also *Ex p. Brown*, (1886) 28 Fed. Rep. 653, that the federal and state courts have concurrent jurisdiction.

ARTICLE IV., SECTION 2.

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

I. OBJECT OF THE CLAUSE, 189.

II. LEGISLATION BY CONGRESS, 189.

1. *Validity*, 189.

2. *Exclusiveness of Power of Congress*, 190.

III. SLAVE TAKEN BY MASTER INTO A FREE STATE, 190.

IV. RECLAMATION FROM UNORGANIZED TERRITORIAL POSSESSIONS, 191.

V. STATE STATUTE PROHIBITING HARBORING A SLAVE, 191.

VI. STATE LAW PERMITTING ARREST AND SALE OF RUNAWAY SLAVE, 192.

I. OBJECT OF THE CLAUSE. — The object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves as property in every state in the Union into which they might escape. Historically it is known that without this provision the Constitution would not have been adopted, and the Union could not have been formed.

Osborn v. Nicholson, (1871) 13 Wall. (U. S.) 661.

"Historically it is well known that the object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding states; and,

indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves." *Per Story, J.*, in *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 611.

II. LEGISLATION BY CONGRESS — 1. *Validity.* — The Act of Congress of Feb. 12, 1793, c. 51 (7), which provided, that when a person held to labor or service in any of the United States escaped into any other of the states or territories, the person to whom such labor or service was due, his agent or attorney, was empowered to seize or arrest such fugitive from labor, and take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the state, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest was made; and upon proof to the satisfaction of such judge or magistrate, either by oral evidence or affidavit, etc., that the person so seized or arrested, under the laws of the state or territory from which he or she fled, owed service or labor to the person claiming him or her, it was the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which was sufficient warrant

for removing the said fugitive from labor to the state or territory from which he or she had fled, was held constitutional.

Prigg v. Pennsylvania, (1842) 16 Pet. (U. S.) 616, wherein the court said: "We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon state magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority so conferred upon state magistrates, while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this court, that state magistrates may, if they choose, exercise that authority unless prohibited by state legisla-

tion." See also *Jones v. Van Zandt*, (1847) 5 How. (U. S.) 229.

The Act of Congress of 1850, known as the Fugitive Slave Law, was constitutional. *Ableman v. Booth*, (1858) 21 How. (U. S.) 506; *Fugitive Slave Law*, (1851) 1 Blatchf. (U. S.) 635, 30 Fed. Cas. No. 18,261; *Matter of Susan*, (U. S. Cir. Ct. 1818) 2 Wheeler Crim. (N. Y.) 594, 23 Fed. Cas. No. 13,632; *Miller v. McQuerry*, (1853) 5 McLean (U. S.) 469, 17 Fed. Cas. No. 9,583; *Matter of Peter*, 2 Paine (U. S.) 348, 16 Fed. Cas. No. 9,154; *McElvain v. Mudd*, (1870) 44 Ala. 54; *Sims's Case*, (1851) 7 Cush. (Mass.) 285; *Henry v. Lowell*, (1853) 16 Barb. (N. Y.) 268.

2. Exclusiveness of Power of Congress. — A state statute making it an offense for any person by force and violence to take and carry away or cause to be taken and carried away, and to seduce or cause to be seduced, or to attempt to take, carry away, or seduce any negro or mulatto from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining such negro or mulatto as a slave or servant for life, or for any term whatsoever, was held to be unconstitutional. This clause of the Constitution manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave which no state law or regulation could in any way qualify, regulate, control, or restrain. The slave was not to be discharged from service or labor, in consequence of any state law or regulation.

Prigg v. Pennsylvania, (1842) 16 Pet. (U. S.) 619, wherein the court said: "The fundamental principle applicable to all cases of this sort would seem to be that where the end is required the means are given, and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted. The clause is found in the National Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them, and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights

and duties imposed upon it by the Constitution." See *Matter of Susan*, (U. S. Cir. Ct. 1818) 2 Wheel. Crim. (N. Y.) 594, 23 Fed. Cas. No. 13,632; *Matter of Perkins*, (1852) 2 Cal. 424; *Thornton's Case*, (1849) 11 Ill. 335; *Jack v. Martin*, (1834) 12 Wend. (N. Y.) 311, *affirmed* (1835) 14 Wend. (N. Y.) 507; *Matter of Kirk*, (Supm. Ct. 1846) 1 Park. Crim. (N. Y.) 67.

"Congress have power to provide for the recaption of fugitive slaves. The states have the same power, so long as their enactments are not in conflict with the Acts of Congress on the subject. It is true that this principle was denied by Justice Story in *Prigg v. Pennsylvania*, (1842) 16 Pet. (U. S.) 539. But that opinion was on a question which did not arise in the case. It was one of the most mischievous heresies ever promulgated. It was never received as the true construction of the Federal Constitution, and the more recent case of *Moore v. Illinois*, (1852) 14 How. (U. S.) 13, shows that it was promulgated without the sanction of a majority of the court." *Weaver v. Fegely*, (1857) 29 Pa. St. 30.

III. SLAVE TAKEN BY MASTER INTO A FREE STATE. — There is no principle of the common law, or of the law of nations, which would authorize the recaption of a slave who escaped from the state where he was held in bondage to a state or

territory where slavery was not allowed by law. To avoid this consequence, and preserve the harmony of the states, the above provisions were adopted. Where the slave absconds, the master may reclaim him. But where the slave is taken to a free state by the master, or goes there with his assent, the slave cannot, within the meaning of the Constitution, be said to be a fugitive from labor, and consequently the master cannot reclaim him.

Giltner v. Gorham, (1848) 4 McLean (U. S.) 402, 10 Fed. Cas. No. 5,453. See also the following cases:

United States. — *Butler v. Hopper*, (1806) 1 Wash. (U. S.) 499, 4 Fed. Cas. No. 2,241; *Ex p. Simmons*, (1823) 4 Wash. (U. S.) 396, 22 Fed. Cas. No. 12,863.

Connecticut. — *Jackson v. Bulloch*, (1837) 12 Conn. 40.

Massachusetts. — *Com. v. Aves*, (1836) 18 Pick. (Mass.) 193.

Mississippi. — *Berry v. Alsop*, (1871) 45 Miss. 8; *Mitchell v. Wells*, (1859) 37 Miss. 235; *Heirn v. Bridault*, (1859) 37 Miss. 209.

Wisconsin. — *Matter of Booth*, (1854) 3 Wis. 16.

This clause did not extend beyond the case of an actual escape of a slave from one state to another, and the *New York* statute declaring that no person held as a slave should be imported, introduced, or brought into the state on any pretense whatever, except in the cases mentioned in the Act, and that any person brought there as a slave contrary to the Act should be free, was held to be valid. *Lemmon v. People*, (1860) 20 N. Y. 600.

IV. RECLAMATION FROM UNORGANIZED TERRITORIAL POSSESSIONS. — The constitutional right of a citizen of the United States to reclaim a fugitive from his lawful service extends not only to the states and to the organized territories, but also to all the unorganized territorial possessions of the United States.

Reclamation of Fugitives from Service in Unorganized Territories, (1854) 6 Op. Atty-Gen. 302, wherein the attorney-general advised that a fugitive from service cannot be protected from extradition by any Indian tribe or nation, for the Indians are themselves the mere subjects of the United States and have no power in conflict with the Constitution; and criticised the previous opinion (Power of President to Cause Surrender of Slaves in Refuge with Indians, (1838) 3 Op. Atty-Gen. 370) wherein the attorney-general advised that the President had no power to cause fugitive slaves who had taken refuge among the Indians west of the Mississippi to be apprehended and delivered by the United States officers and agents to the owners from

whom such slaves had fled. "The territory west of the Mississippi assigned to the Indian tribes, not being in the condition contemplated by the clause referred to, is not included within its terms. But, as Congress have the general power of legislation over the Indian country in points not inconsistent with treaty stipulations, as well as over the other territories of the United States, and are, moreover, expressly empowered to regulate commerce with the Indian tribes, they may undoubtedly make such legislative provisions in regard to fugitive slaves who take refuge in the Indian country as they may deem necessary to carry into effect the spirit and design of this part of the Constitution."

V. STATE STATUTE PROHIBITING HARBORING A SLAVE. — A state statute provided that "if any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant owing service or labor to any other persons, whether they reside in this state or in any other state or territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them, in a lawful manner, every such person so offending shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months." It was held that this statute was not in conflict with this clause. As the statute does not impede the master in the exercise of his rights, so neither does it interfere to aid and assist him.

Moore v. Illinois, (1852) 14 How. (U. S.) 17, wherein the court said: "In view of this section of the criminal code of Illinois, and

this indictment founded on it, we are unable to discover anything which conflicts with the provisions of the Constitution of the United

States or the legislation of Congress on the subject of fugitives from labor. It does not interfere in any manner with the owner or claimant in the exercise of his right to arrest and recapture his slave. It neither interrupts, delays, nor impedes the right of the master to immediate possession. It gives no immunity or protection to the fugitive against the claim of his master. It acts neither on the master nor his slave; on his right or his remedy.

It prescribes a rule of conduct for the citizens of Illinois. It is but the exercise of the power which every state is admitted to possess, of defining offenses and punishing offenders against its laws." See *Matter of Perkins*, (1852) 2 Cal. 424; *State v. Moore*, (1855) 6 Ind. 437; *Donnell v. State*, (1852) 3 Ind. 481; *Opinion of Justices*, (1861) 46 Me. 561; *Opinion of Justices*, (1861) 41 N. H. 553.

VI. STATE LAW PERMITTING ARREST AND SALE OF RUNAWAY SLAVE. —

This article was held not to apply to the case of a runaway slave arrested in another state, confined in jail, and after advertisement for a reasonable time to notify the owner, sold at public auction for his benefit; the laws of the slave state on that subject being matters of police, essential to the protection of its citizens, and designed for the protection of the owner himself.

Landry v. Klopman, (1858) 13 La. Ann. 345, in which case the court said: "The history of the Constitution of the United States shows that this clause was introduced into 'the Constitution solely for the benefit of the slaveholding states to enable them to reclaim their fugitive slaves who should escape into other states where slavery is not tolerated.' Story Const., sec. 952. And the language of the clause clearly shows that this was the intention. It declares that no person held to labor shall, in consequence of any law or regulation, be discharged from such service or labor. The regulation here spoken of is

one therefore between the slave and his master; the slave is not to be discharged from labor, but is to be given up. Now this cannot, in our opinion, be applied to controversies arising between two persons claiming the ownership of a slave depending upon the laws of different states, although the slave was a fugitive from labor; for the slave is not discharged from labor or service, but the right to his service or labor is the subject-matter of a controversy between others, in which, in a legal point of view, he has no interest."

ARTICLE IV., SECTION 3.

"New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress."

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I. POWER OF CONGRESS LIMITED TO ADMISSION.—Congress can admit new states into this Union, but cannot form states. Congress has no creative power in that respect, and cannot admit into this Union any territory, district, or other political entity less than a state. And such state must exist, as a separate independent body politic, before it can be admitted under this clause of the Constitution, and there is no other clause. The new state which Congress may admit, by virtue of this clause, does not owe its existence to the fact of admission, and does not begin to exist coeval with that fact; for, if that be so, then Congress makes the state; for no other power but Congress can admit a state into the Union.

Act for Admission of West Virginia into Union, (1862) 10 Op. Atty-Gen. 427. See also *Permoli v. Municipality No. 1*, (1845) 3 How. (U. S.) 609, wherein the court said: "No fundamental principles could be added

by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire."

II. AUTHORITY TO ACQUIRE TERRITORY.—The power to acquire territory is authorized by the power to enlarge the number and limits of the United States by the admission of new states into the Union, and this includes the

power to govern the same by Congress in the meantime and until the territory is deemed fitted for statehood.

Nelson v. U. S., (1887) 30 Fed. Rep. 115. See also *infra*, this section of the Constitution, the clause that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the terri-

tory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state," p. 200.

III. CONDITIONS PRESCRIBED BY CONGRESS. — By the Act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the Act of 1811. Congress declared it should be on the conditions and terms contained in that Act, which should be considered, deemed, and taken as fundamental conditions and terms upon which the state was incorporated in the Union. The court said: "All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances. The instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the constitution and admitted the state, 'on an equal footing with the original states in all respects whatever,' in express terms, by the Act of 1812, Congress was concluded from assuming that the instructions contained in the Act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire."

Permoli v. Municipality No. 1, (1845) 3 How. (U. S.) 609. In the Act of Congress of Feb. 20, 1811, certain restrictions were imposed in the form of instructions to the convention that might frame the constitution, such as that it should be republican; consistent with the Constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of

habeas corpus; that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States.

But see *Brittle v. People*, 2 Neb. 198, wherein it was held that upon the admission of a state a condition prescribed by Congress becomes a part of the state constitution though not incorporated therein.

IV. CONSENT OF LEGISLATURE OF STATE CONCERNED. — The sense and spirit of the constitutional provision require that the legislature which gives consent on behalf of a state to the formation of a new state within its jurisdiction should be a legislature representing and governing the whole, and not merely a part of such state.

Act for Admission of West Virginia into Union, (1862) 10 Op. Atty.-Gen. 426, advising that the Act for the admission of the state of West Virginia was not warranted by the law of the Constitution, whether construed as prohibiting the formation of a new state within the jurisdiction of any other state or as authorizing such formation with the consent of the legislature of the state con-

cerned. The legislature which, at Wheeling, on May 13, 1862, gave its consent to the dismemberment of the state of Virginia, being composed chiefly, if not entirely, of persons representing the forty-eight counties which constitute the state of West Virginia, was not a legislature competent to give consent, on behalf of Virginia, to the formation of West Virginia.

V. EFFECT OF ADMISSION — 1. Transfer of Causes to Federal and State Courts. — Whenever a territory is admitted into the Union as a state the cases pending in the territorial courts of a federal character or jurisdiction are transferred

to the proper federal court, but all such as are not cognizable in the federal courts are transferred to the tribunals of the new state. Pending cases, where the federal and state courts have concurrent jurisdiction, may be transferred either to the state or federal courts by either party possessing that option under the existing laws.

Baker v. Morton, (1870) 12 Wall. (U. S.) 153. See *Glaspell v. Northern Pac. R. Co.*, (1892) 144 U. S. 218.

Failure to provide for pending cases.—When Congress has passed an Act admitting a territory into the Union as a state, but omitting to provide, by such Act, for the disposal of cases pending in this court on appeal or writ of error, it may constitutionally and properly pass a subsequent Act making such provision for them. *Freeborn v. Smith*, (1864) 2 Wall. (U. S.) 160.

Pending prosecutions.—Congress has the constitutional power to save to the federal

courts the right to punish an offense committed in a territory after its admission as a state. *U. S. v. Baum*, (1896) 74 Fed. Rep. 43.

Suit for libel.—Florida was admitted into the Union as a state on March 3, 1845, and in 1845 the state legislature passed an Act for the transfer from the territorial to the state courts of all cases except those cognizable by the federal courts, and in 1847 Congress provided for the transfer of these to the federal courts. The territorial court was without jurisdiction in 1846 of a case of libel. *Benner v. Porter*, (1850) 9 How. (U. S.) 235.

2. Jurisdiction over Indian Reservations.—The admission of a territory into the Union upon an equality with the other states, without any special reservation of jurisdiction over the place then known and occupied as an Indian reservation, extended the jurisdiction of the state thereover as to all subjects constitutionally within its power of legislation—such as a crime committed thereon by one white man upon another, and it may be by one Indian upon another. But the subject of the intercourse between the Indians and other people in the state still remained a matter within the jurisdiction of the United States, just as much as when the country was a territory.

U. S. v. Martin, (1883) 14 Fed. Rep. 821.

Reservation of jurisdiction in Congress.—It was held that there was no legal objection to the agreement made by the people of the

state of Montana, in convention assembled, to the effect that Congress should retain jurisdiction and control over the Indian reservations within its borders. *U. S. v. Partello*, (1891) 48 Fed. Rep. 677.

3. Effect on Indian Treaties — Repeals Right to Hunt on Public Lands.—The provision of a treaty with an Indian tribe giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed by a state statute regulating the killing of game within the state, enacted after its admission as a state under an enabling Act of Congress declaring that the state is admitted on equal terms with the other states.

Ward v. Race Horse, (1896) 163 U. S. 507, wherein the court said: "The Act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty

if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law passed in the undoubted exercise of its municipal authority. But the language of the Act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule."

Vested Fishing Rights Not Extinguished.—An Indian treaty, the object of which was to limit the occupancy to certain lands and to define rights outside of them, reserved to the Indians as follows: "The exclusive right of taking fish in all the streams where running through or bordering said reservation is further

secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them." The admission of the territory as a state did not extinguish this treaty right, as the United States, while it holds the country as a territory, has the power to create rights which will be binding on the states.

U. S. v. Winans, (1905) 198 U. S. 378, wherein the court said: "The extinguishment of the Indian title, opening the land for settlement, and preparing the way for future states were appropriate to the objects for which the United States held the territory. And surely it was within the competency of

the nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised."

4. Laws Passed by Territorial Legislature After Admission. — When the territorial legislature is in session when an Act admitting the territory as a state is passed, it has the power to continue in the discharge of the duties of that department until superseded, according to the mode of procedure prescribed in the organic Act or the laws of the territory, and the laws so passed are valid if their provisions are not in conflict with the Constitution of the United States or of the state.

State v. Hitchcock, (1862) 1 Kan. 181.

5. Rights Remaining in the National Government — *a. LAWS OF CONGRESS EXTEND OVER NEW STATE.* — The laws of the United States extended over Texas from the time of its admission by Congress, and the seizure of goods thereafter under the revenue laws of the old republic was without authority of law.

Calkin v. Cocks, (1852) 14 How. (U. S.) 227.

b. PUBLIC AND UNOCCUPIED LANDS. — Public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right, or embarrass its exercise.

Van Brocklin v. Tennessee, (1886) 117 U. S. 167.

Status of proprietorship under state sovereignty. — On the admission of California into the Union, upon an equal footing with the original states, the sovereignty for all internal municipal purposes, and for all purposes except such purposes and with such powers as are expressly conferred upon the national government by the Constitution of the United States, passed to the state of California. Thenceforth, the only interest of the United States in the public lands was that of a proprietor, like that of any other proprietor, except that the state, under the express terms upon which it was admitted, could pass no laws to interfere with their

primary disposal, and they were not subject to taxation. In all other respects the United States stood upon the same footing as private owners of land. They could authorize no invasion of private property, either to enable their grantees to mine the lands purchased by them of the government or otherwise. *Woodruff v. North Bloomfield Gravel Min. Co.*, (1884) 18 Fed. Rep. 772.

The right of the United States to public lands originated in voluntary surrenders made by several of the old states of their waste and unappropriated lands to the United States under a resolution of the old Congress of the 6th of September, 1880, recommending such surrender and cession to aid in paying the public debt incurred by the war of the

Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt and to erect new states over the territory thus ceded, and as soon as these purposes could

be accomplished the power of the United States over these lands as property was to cease. *Pollard v. Hagan*, (1845) '3 How. (U. S.) 224.

c. EXEMPTION OF PROPERTY OF UNITED STATES FROM TAXATION. — The provisions which speak of the exemption of property of the United States from taxation, in the various Acts of Congress admitting states into the Union, are equivalent to each other; and, like the other provision, which often accompanies them, that the state "shall not interfere with the primary disposal of the soil by the United States," they are but declaratory, and confer no new right or power upon the United States.

Van Brocklin v. Tennessee, (1886) 117 U. S. 167. .

6. Rights Acquired by a New State — a. ON EQUAL FOOTING WITH THE OLD STATES. — The right of every new state to exercise all the powers of government which belong to and may be exercised by the original states of the Union must be admitted and remain unquestioned except so far as they are temporarily deprived of control over the public lands.

Pollard v. Hagan, (1845) 3 How. (U. S.) 223, wherein it was said that when Alabama was admitted into the Union on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession of the territory to the United States, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere, except in the cases in which it is expressly granted. See also *Illinois Cent. R. Co. v. Illinois*, (1892) 146 U. S. 434; *Knight v. U. S. Land Assoc.*, (1891) 142 U. S. 183; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 686; *Weber v. Harbor Com'rs*, (1873) 18 Wall. (U. S.) 65.

The true constitutional equality between the states only extends to the right of each, under the Constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government. *Case v. Toftus*, (1889) 39 Fed. Rep. 732, wherein the court said: "The doctrine that new states must be admitted into the Union

on an 'equal footing' with the old ones does not rest on any express provision of the Constitution, which simply declares 'new states may be admitted by Congress into this Union,' but on what is considered and has been held by the Supreme Court to be the general character and purpose of the union of the states, as established by the Constitution, — a union of political equals." *Pollard v. Hagan*, (1845) 3 How. (U. S.) 233; *Permol v. Municipality No. 1*, (1845) 3 How. (U. S.) 609; *Strader v. Graham*, (1850) 10 How. (U. S.) 92. But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The ante-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held as the political successors of the British crown."

Under limitations of their own constitutions. — Admitting a state into the Union, on an equal footing with the original states, does not mean that its powers, legislative, judicial, and executive, shall be exercised to the same extent and in the same mode as all the other states. In this respect, the states are unequal, as perhaps the powers of no two states are exercised in the same mode and to the same extent. They are equal, as being alike free in the formation of their constitution, and in the exercise of the powers of government under such restrictions and limitations as each may have voluntarily imposed on itself, and in the people of each having the power to modify or change their constitution at discretion. *Spooner v. McConnell*, (1838) 1 McLean (U. S.) 337, 22 Fed. Cas. No. 13,245.

b. GENERAL CIVIL AND CRIMINAL JURISDICTION. — Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil

and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States.

Van Brocklin v. Tennessee, (1886) 117 U. S. 167.

c. TITLE TO PROPERTY OWNED BY TERRITORY. — Unless otherwise declared by Congress, the title to every species of property owned by a territory passes to the state upon its admission into the Union.

Brown v. Grant, (1886) 116 U. S. 212.
See also *Van Brocklin v. Tennessee*, (1886) 117 U. S. 167, that the rights of local sovereignty, including the title to lands held in

trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state and not in the United States.

d. TITLE TO SHORE OR TIDE LANDS. — On the admission of a new state into the Union, the "shore" or tide lands therein, not disposed of by the United States prior thereto, become the property of the state. The owner of land abutting on the "shore" or tide lands in such state, and not disposed of by the United States or the state, has a right of access from his land to the water, and may erect and maintain a private wharf there for his own convenience, so long as he does not materially interfere with the rights of the general public, and subject to the power of the legislature to regulate such use.

Case v. Toftus, (1889) 39 Fed. Rep. 730.
See also *Van Brocklin v. Tennessee*, (1886) 117 U. S. 167.

the other new states, vests in such state on its admission into the Union. *Mare Island*, (1853) 8 Op. Atty-Gen. 422.

The vacant shore land between high and low water mark in California, as in each of

See also *Ownership and Grants of Shores and Tidewater Lands*, 8 FED. STAT. ANNOT. 476.

e. CONTROL OF NAVIGABLE WATERS. — New states have the same rights, sovereignty, and jurisdiction over the shores of navigable waters and the soils under them as the original states, and the Act of Congress admitting a state into the Union providing "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state," conveys no more power over the navigable waters of such state to the government of the United States than it possesses over the navigable waters of other states under the provisions of the Constitution.

Pollard v. Hagan, (1845) 3 How. (U. S.) 223. See also *Shively v. Bowlby*, (1894) 152 U. S. 26; *Goodtitle v. Kibbe*, (1850) 9 How. (U. S.) 471; *Doe v. Beebe*, (1851) 13 How. (U. S.) 25. See also *Navigation and Navigable Waters — General Authority of States over Navigable Waters*, 8 FED. STAT. ANNOT. 474.

Michigan, on her admission, became entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original states, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof. *Sands v. Manistee River Imp. Co.*, (1887) 123 U. S. 288.

Power of state to improve navigation. — A statute of *Mississippi* creating a board of

commissioners for the purpose of improving the navigation of a river within that state is not a violation of the Act of Congress authorizing the people of the Mississippi territory to form a constitution, which Act declared "that the Mississippi river, and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the state of Mississippi as to other citizens of the United States." It cannot be imputed to Congress that they ever designed to forbid, or to withhold from the state of Mississippi the power of improving the interior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or the flow of rivers situated within the interior of the state. Could such an intention be ascribed to Congress, the right to enforce it

may be confidently denied. Clearly Congress could exact of the new state the surrender of no attribute inherent in her character as a sovereign independent state, or indispensable

to her equality with her sister states, necessarily implied and guaranteed by the very nature of the federal compact. *Withers v. Buckley*, (1857) 20 How. (U. S.) 92.

f. RIGHT OF EMINENT DOMAIN. — The right of eminent domain passes to a new state on its admission in virtue of the inherent equality of the several states.

Eminent Domain of Texas, (1857) 8 Op. Atty-Gen. 334.

When any new state was admitted from the Northwest Territory, the provision in the ordinance for the government of that territory which declared that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, with-

out any tax, impost, or duty therefor," ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original states. On the admission of any such new state it at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to them. *Willamette Iron Bridge Co. v. Hatch*, (1888) 125 U. S. 9. See also *Sands v. Manistee R. Imp. Co.*, (1887) 123 U. S. 288; *Huse v. Glover*, (1886) 119 U. S. 543; *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 678; *State v. School Dist. No. Eight*, (1890) 76 Wis. 207.

VI. WHEN REPRESENTATION IN CONGRESS BEGINS. — A territory having adopted a constitution and formed a state government cannot have a representative in Congress until she is admitted into the Union; therefore, a representative to Congress elected before the state is admitted is entitled to pay only from the time of such admission.

Conway's Case, (1863) 1 Ct. Cl. 68.

ARTICLE IV., SECTION 3.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

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I. SOVEREIGN POWER OVER ACQUIRED TERRITORY.—Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it is destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror.

U. S. v. Huckabee, (1872) 16 Wall. (U. S.) 434.

On the cession of California by treaty with Mexico, the federal government had not only the right of eminent domain, but the fee, and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty. The territory of California passed to the United States, subject to the power of the federal government to establish a territorial government, or erect the

same into a state. *People v. Folsom, (1855) 5 Cal. 378.*

Sovereignty suspended when territory captured by enemy.—The sovereignty of the United States over territory captured by an enemy, and in its open and exclusive possession, is suspended, and the laws of the United States can no longer be rightfully enforced or be obligatory upon the inhabitants who remain to submit to the conquerors. *U. S. v. Hayward, (1815) 2 Gall. (U. S.) 485, 26 Fed. Cas. No. 15,336.*

II. CONTROL OF PUBLIC LANDS—1. Power of Congress—*a. POWER OF CONGRESS EXCLUSIVE.*—No appropriation of public land can be made for any purpose but by authority of Congress.

U. S. v. Fitzgerald, (1841) 15 Pet. (U. S.) 421. See also *U. S. v. Tichenor, (1882) 12 Fed. Rep. 423.*

The Constitution of the United States vests in Congress the exclusive power of disposing of and making all needful rules and regulations in relation to the public lands. State courts have no authority to interfere with the primary disposal of the soil. The matter rests exclusively with the general government, which has, from the beginning, acted upon it by legislation through boards of commissioners, receivers, and registers, under the final supervision of the secretary of the treasury. The decisions of that officer, made within the jurisdiction vested in him, cannot

be reviewed by us. *Terry v. Hennen, (1849) 4 La. Ann. 464.*

Neither the President nor any of the executive officers in the several departments of the government can make a reservation or appropriation of the public domain for any purpose whatever without the express authority of law. *McConnell v. Wilcox, (1837) 2 Ill. 353.*

The President has the power to make reservations of public lands for public uses, as for occupation by Indians, from the public domain lying within the limits of a state. *Indian Reservations, (1882) 17 Op. Atty-Gen. 258, wherein the attorney-general seemed to infer a statutory authority.*

b. POWER TO DISPOSE OF PUBLIC LANDS—(1) In General.—The words “dispose of” vest in Congress the power not only to sell but also to lease the lands of the United States. The disposal must be left to the discretion of Congress.

U. S. v. Gratiot, (1840) 14 Pet. (U. S.) 538. See also *U. S. v. Tichenor, (1882) 12 Fed. Rep. 422.*

needful rules and regulations respecting the territory” or public domain, being expressly delegated by the Constitution of the United States, it follows that the laws of Congress, made for the purpose of such disposition and

The “power to dispose of and make all

for the complete investiture of the title in the purchaser or donee, are made in pursuance of the powers delegated. *Rose v. Buckland*, (1856) 17 Ill. 311.

The term "territory" as here used is merely descriptive of one kind of property and is equivalent to the word "lands." *U. S. v. Gratiot*, (1840) 14 Pet. (U. S.) 537.

(2) *Declare Mode of Conveyance.* — Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring the national public lands, or any part of them, and to designate the person to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise.

Gibson v. Chouteau, (1871) 13 Wall. (U. S.) 99.

The United States, being the owner of the public lands within the states and territories, have the right to say to whom, in what mode, and by what title, they shall be conveyed. *Irvine v. Marshall*, (1857) 20 How. (U. S.) 558.

The term "disposed of" was adopted from the ordinance of 1785 and comprehends every mode by which the lands and other property of the United States could be parted with by the government, whether by sale, gift, or for any limited interest. *Leases of Mineral Lands on Isle Royale*, (1846) 4 Op. Atty.-Gen. 487.

(3) *Direct Issue of Patent to Particular Person.* — Congress can direct the issue of a patent to a certain person by a special statute, if a right to the land has not vested in another before the passage of the Act.

Emblen v. Lincoln Land Co., (1902) 184 U. S. 664, *affirming* (C. C. A. 1900) 102 Fed. Rep. 559.

(4) *Grants Below High-water Mark.* — Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

Shively v. Bowlby, (1894) 152 U. S. 48, wherein the court said: "Notwithstanding the dicta contained in some of the opinions of this court, * * * to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true. * * * By

the Constitution, as is now well settled, the United States having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition."

(5) *Impose Conditions on Disposition.* — Under the Federal Constitution, Congress is vested with the exclusive power to manage and dispose of the public lands. It may dispose of them in such manner, on such terms and conditions, and subject to such restrictions and limitations as in its judgment will best promote the public welfare.

Davidson v. Jordan, (1874) 47 Cal. 351.

The validity of a restriction found in an Indian treaty and contained in a patent of land "not to be leased or sold by the grantee to any person or persons whatever without the permission of the President of the United States," is unquestionable. *Farrington v. Wilson*, (1872) 29 Wis. 390, in which case the court approved of the statement that "with respect to the public domain the Constitution vests in Congress the power of disposition, and of making all needful rules and regulations. That power is subject to no limita-

tions. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the person to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference, a provision has been usually inserted in the compacts by which the new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

(6) *Prohibit Assignment of Bounty Warrants.* — An Act of Congress providing for the survey of certain of the public domain, for the locating of military boundaries therein, for the issuing of warrants for the period of five years to the parties entitled to such bounty, and for the granting of patents to them, is valid in providing "that no claim for military land bounties shall be assignable or transferable in any manner whatever until after patent shall have been granted in manner aforesaid. All sales, mortgages, contracts, or agreements of any nature whatever, made prior thereto, for the purpose, or with the intent of alienating, pledging, or mortgaging any such claim, are hereby declared and shall be held null and void."

Rose v. Buckland, (1856) 17 Ill. 309.

(7) *Exempt Lands from Debts Contracted Before Issue of Patent.* — An Act of Congress exempting all lands patented under the Act of which it is a part, from liability for any of the debts of the patentee contracted prior to the issuing of the patent, whether the lands are still held by the patentee, or a *bona fide* purchaser deriving title from him, is valid.

Russell v. Lowth, (1874) 21 Minn. 168. See also *Gile v. Hallock*, (1873) 33 Wis. 523.

(8) *Declare Effect of Titles.* — Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the federal government, in reference to the public lands, declares the patent the superior and conclusive evidence of legal title; until its issuance, the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment.

Bagnell v. Broderick, (1839) 13 Pet. (U. S.) 450.

(9) *Question of Fraud.* — When a grant or a patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant.

Field v. Seabury, (1856) 19 How. (U. S.) 332, *reversing* (1855) *McAll.* (U. S.) 1, 21 Fed. Cas. No. 12,574.

c. **POWER TO IMPOSE CONDITIONS ON PRIVILEGE OF USING.** — As the lands and springs at the Hot Springs reservation are the absolute property of the government, the government acting through Congress has the right to control them or refuse the use of them to the public, or, if it permits such use, to prescribe the terms and conditions under which this privilege can be enjoyed; Congress can delegate the power to make rules and regulations to the secretary of the interior.

Van Lear v. Eisele, (1903) 126 Fed. Rep. 825.

d. **POWER TO PREVENT UNLAWFUL OCCUPATION.** — An Act of Congress passed to prevent unlawful occupation of public lands is valid.

Camfield v. U. S., (1897) 167 U. S. 525, wherein the court said: "While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state, which it would have within a territory, we do not think the admission of a territory as a state deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the

United States completely at the mercy of state legislation."

Power to prohibit and punish trespassing. — "For the disposal of the public lands, therefore, in the new states where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; so Congress may prohibit and punish trespassers on the public lands. Having the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title." *Jourdan v. Barrett*, (1846) 4 How. (U. S.) 169.

e. VALIDITY OF GRANTS PRIOR TO ACQUISITION OF TERRITORY BY UNITED STATES. — The question of the validity of grants obtained prior to the acquisition of territory by the United States is for the consideration of Congress, and the courts are concluded by the action of that body.

Tameling v. U. S. Freehold, etc., Co., (1876) 93 U. S. 603. See also *Maxwell Land Grant Case*, (1887) 121 U. S. 366.

f. RIGHT TO EXTINGUISH INDIAN TITLE. — The territory or unpatented lands then within the territorial boundaries of the United States, and which did not belong to the original individual states, was intended to be, and upon the ratification and adoption of the Constitution did become, the absolute property of the United States, subject only to the right of occupancy by the Indians. But the United States possessed the right to extinguish the Indian title of occupancy either by conquest or purchase.

U. S. v. Nelson, (1886) 29 Fed. Rep. 204, *affirmed* (1887) 30 Fed. Rep. 112.

g. ABANDONED MILITARY RESERVE. — A military reserve may be abandoned by the government when it becomes useless for public purposes, and by giving notice through the secretary of the treasury (now the secretary of the interior) it may be considered as a part of the public lands, from which it was temporarily reserved. Such lands having been surveyed and offered at public auction may be open to entry as other lands.

U. S. v. Railroad Bridge Co., (1855) 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114. But see *Rock Island Military Reservation*,

(1862) 10 Op. Atty-Gen. 370, as to the facts constituting abandonment.

h. POWER TO DELEGATE TO STATES AUTHORITY TO MAKE REGULATIONS. — Congress may delegate to state legislatures the making of additional regulations respecting the disposal of and acquiring title to public lands, and a state statute, relating to mining claims, providing that the declaratory statement filed in the office of the clerk of the county in which the lode or claim is situated must contain "the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims," and "the location and description of each corner, with the markings thereon," is not invalid as too stringent and conflicting with the liberal purpose manifested by Congress in its legislation respecting mining claims.

Butte City Water Co. v. Baker, (1905) 196 U. S. 126, wherein the court said: "Congress is the body to which is given the power

to determine the conditions upon which the public lands shall be disposed of. The nation is an owner, and has made Congress the prin-

cial agent to dispose of its property. Is it inconceivable that Congress, having regard to the interests of this owner, shall, after prescribing the main and substantial conditions of disposal, believe that those interests will be subserved if minor and subordinate regulations are intrusted to the inhabitants of the mining district or state in which the particular lands are situated? While the disposition of these lands is provided for by congressional legislation, such legislation savors somewhat

of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term, and as an owner may delegate to his principal agent the right to employ subordinates, giving to them a limited discretion, so it would seem that Congress might rightfully intrust to the local legislature the determination of minor matters respecting the disposal of these lands."

2. State Legislation Affecting Public Lands and Grants—*a. STATE'S RIGHT OF EMINENT DOMAIN.* — Land within a state purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain. But though land purchased within a state for ordinary purposes by the general government must yield to the local public demands, yet land, when held at first by an original cession to that government, and afterwards appropriated for a specific public object, is not liable to be taken away for an ordinary local object, though public, and especially one under another government and by mere implication.

U. S. v. Chicago, (1849) 7 How. (U. S.) 194.

A state may make public roads through the lands of the United States under its power of eminent domain, and this power may be exercised by the states subject to no power

vested in the federal government. The proprietary rights of the United States can in no respect restrict or modify this exercise of the sovereign power of the state. *U. S. v. Railroad Bridge Co.*, (1855) 6 McLean (U. S.) 517, 27 Fed. Cas. No. 16,114.

b. STATE CANNOT TAX. — This provision implies the exclusion of all other authority over the property which could interfere with this right or obstruct its exercise, and a state has no power to tax the property of the United States within its limits.

Wisconsin Cent. R. Co. v. Price County, (1890) 133 U. S. 504. See also *Pollard v. Hagan*, (1845) 3 How. (U. S.) 224.

c. WHEN STATE LAWS REGULATING DISPOSITION ATTACH. — Whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States. The state has an undoubted right to legislate as she may please in regard to the remedies to be prescribed in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation.

Wilcox v. Jackson, (1839) 13 Pet. (U. S.) 517.

III. PURCHASE OF PROPERTY CAPTURED FROM CONFEDERATE GOVERNMENT — Purchasers from the United States of property bought by the Confederate government, and captured by the United States, obtained a good title.

U. S. v. Huckabee, (1872) 16 Wall. (U. S.) 434.

IV. EXECUTIVE DEPARTMENT CANNOT SELL PUBLIC PROPERTY. — By the Constitution the power to dispose of and make all necessary rules and regulations respecting the territory or property belonging to the United States is vested in Congress. In the absence of authority conferred by Congress, the President cannot dispose of public property of the United States, and neither the President nor the war department has power to grant a concession of the right to use the water power of the river Plata in Porto Rico after the treaty with Spain, when, prior to the treaty, the crown of Spain was the owner for public use of the proprietary rights of the natural beds or channels of rivers, both navigable and unnavigable, to the extent covered by the waters in the ordinary greatest swell.

Porto Rico — Concessions, (1839) 22 Op. Atty-Gen. 546.

The war department has no authority to sell the public property put under its management and superintendence in the absence of laws countenancing the right. *U. S. v. Nicoll*, (1826) 1 Paine (U. S.) 646, 27 Fed. Cas. No. 15,879.

The treasury department has no right to sell public property without the authority of an Act of Congress for that purpose, and cannot ratify an unauthorized sale by the war department. *U. S. v. Nicoll*, (1826) 1 Paine (U. S.) 646, 27 Fed. Cas. No. 15,879.

V. GOVERNMENT OF TERRITORIES — 1. Application of the Federal Constitution. — The Personal and Civil Rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.

Murphy v. Ramsey, (1885) 114 U. S. 44.

In the government of territory acquired by conquest or treaty, Congress cannot do or authorize any Act or pass any law forbidden by the Constitution, as suspending the writ of habeas corpus in time of peace, passing a bill of attainder or *ex post facto* law (Art. I., sec. 9), quartering a soldier in a house without the consent of the owner in time of peace, making a law respecting an establishment of religion (First and Second Amendments), and others. But it may exercise any legislative power not expressly forbidden to it by the Constitution, and to this there may be a further limit that the same shall not be in-

consistent with the general spirit and genius of that instrument, nor contrary to the purpose for which territory may be acquired. Subject to these limitations, the manner in which this power shall be exercised rests in the discretion of Congress. It may legislate for the territory directly and in detail. It may confide the government of the same, with or without special limitation, to a council or commission of its own selection, or it may provide what is known as a territorial government, in which the ordinary powers of legislation shall be confided to an assembly chosen by the residents, or some portion or class of them. *Nelson v. U. S.*, (1887) 30 Fed. Rep. 115.

Constitution Not Self-operating over Ceded Territory. — The power to govern territory, implied in the right to acquire it, and given to Congress in this clause, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Dorr v. U. S., (1904) 195 U. S. 149, in which case the court said: "While these cases, and others which are cited in the late case of *Downes v. Bidwell*, (1901) 182 U. S.

271, sustain the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing

laws for the United States, considered as a political body of states in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 393, 614, said: 'If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power? To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.' In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are

to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, (1901) 182 U. S. 271. Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."

Where the Constitution Has Been Once Formally Extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

Downes v. Bidwell, (1901) 182 U. S. 271, wherein the court said that in the government of acquired territory "we suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice; to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to

be unnecessary to the proper protection of individuals."

"Whatever doubt may have existed as to whether the Constitution and laws of the United States of their own force extended to territory acquired by conquest or by treaty, has been removed since the decision in the case of *Downes v. Bidwell*, (1901) 182 U. S. 244, where the court, after reviewing the various Acts of the Congress respecting the territories of the United States, at page 258 says: 'It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances in each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the states. Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them), Congress has been consistent in recognizing the difference between the states and territories under the Constitution.'" *De Baca v. U. S.*, (1901) 37 Ct. Cl. 497.

2. Power of Congress — a. IN GENERAL. — The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, Congress possesses and may exercise the absolute and undisputed power of governing and legislating for a territory, and may give it a legislative, an executive, and a judiciary, with such powers as are usually assigned to those departments respectively.

Sere v. Pitot, (1810) 6 Cranch (U. S.) 336.

This clause has been considered the foundation upon which the territorial governments rest. *U. S. v. Gratiot*, (1840) 14 Pet. (U. S.) 537. See also *Downes v. Bidwell*, (1901) 182 U. S. 267.

"It is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the states to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a state upon an equality with other states; it may sell its public lands to individual citizens or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress." *De Lima v. Bidwell*, (1901) 182 U. S. 196.

"But this power of Congress to organize territorial governments and make laws for their inhabitants arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else." *U. S. v. Kagama*, (1886) 118 U. S. 380.

"The question, from what source Congress derives the power to legislate for the territories, has been the subject of much discussion, and cannot be said to be authoritatively

settled. The clause in question does not contain the language usually employed in conferring powers of legislation, but apparently refers to mere property. The terms 'or other property' would seem to imply that the territory as property is to be the subject of rules and regulations and disposition. It has been denied that the power to legislate is derived from this clause, and it was pointedly contrasted by Chief Justice Taney, in the case of *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 393, with the language relating to the District of Columbia. It has been maintained that no power of legislation over territories was granted in the Constitution, in terms, or was intended to be so granted, because the government of the existing territories was then already provided for by ordinances of the Congress of the Confederation, and by the terms and conditions of the cessions of territory by Virginia and the other states, and the Constitution did not contemplate or provide for the acquisition of other territories, and that the power actually exercised by Congress, of establishing territorial governments, is simply a consequence of the power to acquire territory by treaty or conquest; and, again, that the territorial governments are substantially the mere exercise of the natural right of self-government by the new political communities occupying the territories, permitted and regulated by Congress, which occupies more an international than a constitutional relation to them. On the other hand, a wider scope has been given to the power to make rules and regulations, and the power to establish territorial governments has been deduced from it. These questions were merely suggested first in the case of *American Ins. Co. v. 356 Bales Cotton*, (1828) 1 Pet. (U. S.) 511; *U. S. v. Gratiot*, (1840) 14 Pet. (U. S.) 526, but were debated at great length in the case of *Dred Scott v. Sandford*." *Roach v. Van Riswick*, (1879) *MacArthur & M.* (D. C.) 181.

b. WITHOUT LIMITATION. — The power over territories is vested in Congress without limitation.

Downes v. Bidwell, (1901) 182 U. S. 267. See also *U. S. v. Gratiot*, (1840) 14 Pet. (U. S.) 537.

c. MAY LEGISLATE DIRECTLY — (1) *In General.* — Congress may legislate directly in respect to the local affairs of a territory.

Binns v. U. S., (1904) 194 U. S. 491.

Congress has authority to enact such forms of territorial government within the territories of the United States as it may choose or deem best, and not in conflict with the Constitution and laws of the United States. Possessing the power to erect a territorial government for Alaska, Congress could confer

upon that territory such powers, judicial and executive, as it deemed most suitable to the necessities of the inhabitants. It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska the power to legislate and make laws. *U. S. v. Nelson*, (1886) 29 Fed. Rep. 205, *affirmed* (1887) 30 Fed. Rep. 112.

(2) *General and Local Legislation.* — In the territories, Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state.

Simms v. Simms, (1899) 175 U. S. 168. See also U. S. v. McMillan, (1897) 165 U. S. 510.

The territories are but political subdivisions of the outlying dominions of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and Congress may legislate for them as a state

does for its municipal organizations. Brunswick First Nat. Bank v. Yankton County, (1879) 101 U. S. 133.

"In legislating for Alaska, Congress exercises the combined powers of the general and of a state government." Allen v. Myers, (1901) 1 Alaska 118, upon the authority of American Ins. Co. v. 356 Bales Cotton, (1828) 1 Pet. (U. S.) 545.

(3) *Prohibiting Importation, Manufacture, and Sale of Liquors.* — Prohibiting the importation, manufacture, and sale of intoxicating liquors in territory acquired by the United States is within the power of Congress.

Nelson v. U. S., (1887) 30 Fed. Rep. 112, affirming (1886) 29 Fed. Rep. 202. See also U. S. v. Binns, (1902) 1 Alaska 553.

Congress may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local

police regulation, or within state control under some other power, it is immaterial to consider. In a territory all the functions of the government are within the legislative jurisdiction of Congress, and may be exercised through a local government, or directly by such legislation as we have now under consideration. Endleman v. U. S., (C. C. A. 1898) 86 Fed. Rep. 459.

d. MAY DELEGATE LEGISLATIVE POWERS TO LOCAL ASSEMBLY — (1) *In General.* — Congress may transfer the power of legislation in respect to local affairs to a legislature elected by the citizens of a territory.

Binns v. U. S., (1904) 194 U. S. 491. See also Sere v. Pitot, (1810) 6 Cranch (U. S.) 336; State v. New Orleans Nav. Co., (1822) 11 Mart. (La.) 309.

A territory is an inchoate state; a portion of the country not included within the limits

of any state, and not yet admitted as a state into the Union, but organized under the laws of Congress, with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States. *Ex p. Morgan*, (1883) 20 Fed. Rep. 304.

Not Necessarily the Same Form of Government in All Territories. — In the government of the territories, Congress had plenary power, save as controlled by the provisions of the Constitution, and the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories.

Binns v. U. S., (1904) 194 U. S. 491.

In ordaining government for the territories and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress, and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular territory, and the qualification of those who shall administer it. It

rests with Congress to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers or the making of its laws, and it may, therefore, take from them any right of suffrage it may have previously conferred, or at any time modify or abridge it as it may deem expedient. *Murphy v. Ramsey*, (1885) 114 U. S. 44.

(2) *Congress Has Supervisory Legislative Control* — (a) *In General.* — Without an express reservation of power, Congress has the power to amend the acts of the territorial legislature. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void.

Brunswick First Nat. Bank v. Yankton County, (1879) 101 U. S. 133. See also U. S. v. McMillan, (1897) 165 U. S. 510.

The government of the territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as

Congress may establish for that purpose. During the term of their pupilage as territories they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government. It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic Act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt. *Snow v. U. S.*, (1873) 18 Wall. (U. S.) 319.

By an Act establishing the territorial government the United States does not part with their jurisdiction. They still retain the power to legislate over the territory on all matters whatever. They simply, by such an Act, implant a new jurisdiction, and their jurisdiction as to all matters confided to the territorial authorities is no longer sole and exclusive. *Watts v. U. S.*, (1870) 1 Wash. Ter. 294.

Territorial governments subject to abolition or modification. — "Under and by virtue of this clause of the Constitution, from time to time Congress has authorized and established temporary governments for the territories, the first of which was provided by the ordinance of 1787, and afterward adopted by

Congress, and from thence continuously until the present time. The governments thus established were and are temporary in their character, and only designed to subserve a temporary purpose. These governments were, and now are, and at all times have been, under the complete control of Congress, and subject to abolition, modification, or change at the behest of the power which created them, and the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of Congress. These inherent infirmities in the governments, and legislative enactments of the territories, at once rob them of all the essential attributes of sovereignty, and make them provinces over whom the United States exercises supreme control. Under and by virtue of this clause of the Constitution, above recited, Congress could sell and dispose of a territory to a foreign power, and not only can it make all needful rules and regulations concerning the territories, but can also abolish them, and the rules and regulations made by Congress are enacted laws, and congressional rules for the territories can be made in no other manner." *Territory v. Lee*, (1874) 2 Mont. 132.

Territorial legislation valid until disapproved. — Though by the fundamental law of a territory its legislation is to be subject to the disapproval of Congress, yet, till disapproved, it is valid and operative. *Miners' Bank v. Iowa*, (1851) 12 How. (U. S.) 1.

(b) **No Annulment of Territorial Statute by Implication.** — In order to subject a territorial statute to the annulling clause of an Act of Congress, the conflict should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible, and not a necessary, construction be repugnant to an annulling Act.

Cope v. Cope, (1891) 137 U. S. 686.

(c) **Validating County Bonds.** — It is within the power of Congress to validate bonds issued by a county in a territory when their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the Act of Congress giving the territory authority to issue bonds for debts or obligations "necessary to the administration of the internal affairs" of the county. Congress has full legislative power over the territories, as full as that which a state legislature has over its municipal corporations, and there was nothing at the time the aforementioned Act was passed to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify.

Utter v. Franklin, (1899) 172 U. S. 423.

(d) **Revocation of Charter of Mormon Church.** — The revocation of the charter of the Church of Jesus Christ of Latter-day Saints was a constitutional exercise of the power of Congress over territories and of the power expressly reserved in the organic act establishing the territory of Utah. By the dissolution of that

corporation its property was governed by the ancient and established rule governing the property of public or charitable corporations; namely, that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority, whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject to the charitable use.

Church of Jesus Christ v. U. S., (1890) 130 U. S. 47, wherein the court said: "The power of Congress, over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The

power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty."

3. Legislative Power of a Territory — a. IN GENERAL. — A territorial legislature has all legislative power except as limited by the Constitution of the United States and the organic Act and the laws of Congress appertaining thereto.

Walker v. New Mexico, etc., R. Co., (1897) 165 U. S. 604.

Congress has enacted that, with certain restrictions, "the legislative power of every territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States." R. S. sec. 1851; Act of July 30, 1886, ch. 818, 24 Stat. L. 170. The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a state, are regulated by the laws of the state only. *Simms v. Simms*, (1899) 175 U. S. 163. See title *Territories*, 7 FED. STAT. ANNOT. 254, 264.

A territorial statute, in conflict with an Act of Congress relating to the government of a territory, is invalid. *People v. Clayton*, (1886) 4 Utah 432.

An Act of a territorial legislature providing for the holding of a convention for the purpose of forming a state constitution, to be submitted to the legal voters of the territory for their approval or rejection, is not inconsistent with the organic Act of the territory or any other law of Congress, or with any provision of the Constitution, and is therefore valid. Whether such legislation is premature is a question that addresses itself solely to the legislature that passed, the governor who approved, and to Congress which had the power finally to ratify or annul the measure. *Arizona Territory*, (1889) 19 Op. Atty-Gen. 335.

The usual way of declaring a territorial statute inoperative, which is inconsistent with the higher law of Congress, is through the courts, just as in the states similar enactments would be adjudged to be unconstitutional. *Matter of Atty-Gen.*, (1881) 2 N. Mex. 58.

The Organic Law of a Territory Takes the Place of a Constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

Brunswick First Nat. Bank v. Yankton County, (1879) 101 U. S. 133.

Lands owned by railroads and held for sale or other disposition for profit, and in no way connected with the use or operation of the railroad, are not "railroad property" in the sense commonly understood to mean the property which is essential to a railroad company

to enable it to discharge its functions and duties as a common carrier by rail, but are property of the railroad company independently of its functions and duties as a common carrier; and a territorial statute which in effect exempts such land from taxation is invalid as conflicting with the organic Act of Congress, providing that the legislative assembly of the territory "shall not pass any

law impairing the rights of private property, nor make any discrimination in taxing different kinds of property, but all property

subject to taxation shall be taxed in proportion to its value." *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 684.

b. FOR ASSESSMENT AND COLLECTION OF TAXES. — The power to legislate delegated to a territorial legislature includes the right to pass uniform laws for the assessment and collection of taxes, and a territorial statute under which it is competent for the taxing authorities of an organized county to levy and collect taxes on personal property situated within the attached reservations of Indians, and belonging to other persons than Indians, is valid.

Wagoner v. Evans, (1898) 170 U. S. 591. See also *Thomas v. Gay*, (1898) 169 U. S. 264.

c. IN FORCE IN A MILITARY RESERVATION. — The power of Congress over a territory is exerted in establishing a government to which is delegated authority to legislate upon all rightful subjects, and a territorial statute is in force in a military reservation within the territory.

Reynolds v. People, (1869) 1 Colo. 180.

4. Territorial Courts — **a. IN GENERAL.** — Territorial courts are established under the authority of this clause.

James v. U. S., (1903) 38 Ct. Cl. 627.

b. ARE LEGISLATIVE COURTS. — Territorial courts are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.

American Ins. Co. v. 356 Bales Cotton, (1828) 1 Pet. (U. S.) 545. See also *U. S. v. McMillan*, (1897) 165 U. S. 510; *Clinton v.*

Englebrecht, (1871) 13 Wall. (U. S.) 447; *Howard v. U. S.*, (1887) 22 Ct. Cl. 316; *Nickels v. Griffin*, (1872) 1 Wash. Ter. 385.

c. DEFINING JURISDICTION OF THE COURTS. — It is within the competency of Congress either to define directly, by its own act, the jurisdiction of the courts which it creates, or to delegate the authority requisite for that purpose to the territorial government; and by either proceeding, to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government, to the tribunals of the government it is about to substitute for the territory in lieu of the temporary or provisional government.

Leitensdorfer v. Webb, (1857) 20 How. (U. S.) 182.

"There is no common law of the United States, as contradistinguished from the individual states; and the courts of the United States, instead of administering the common law, or any particular system, conform to the law of the states where they are situated, so that the acquisition of California did not

extend over it the common law, which recognizes and sustains the doctrine of escheats; for in that case there would have been a continuation of the same political law. But in the absence of any law on the subject the principles of the natural law would prevail, as well as the familiar principle of jurisprudence that any one may inherit who is not expressly prohibited." *People v. Folsom*, (1855) 5 Cal. 379.

d. ABSENCE OF DISTINCTION BETWEEN FEDERAL AND STATE JURISDICTIONS.

—The distinction between the federal and state jurisdictions, under the Constitution of the United States, has no foundation in these territorial governments; and consequently, no such distinction exists, either in respect to the jurisdiction of their courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction.

Benner v. Porter, (1850) 9 How. (U. S.) 242.

e. EXERCISE OF ADMIRALTY JURISDICTION. — An Act of Congress establishing a territory conferred legislative powers extending to all rightful objects of legislation, subject to the restriction that their laws should not be “inconsistent with the laws and Constitution of the United States.” An Act of the territorial legislature establishing a court by whose decree the cargo of a vessel was sold to satisfy a claim for salvage was held to be not inconsistent with the laws and Constitution of the United States. Although admiralty jurisdiction can be exercised in the states in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and of a state government.

American Ins. Co. v. 350 Bales Cotton, (1828) 1 Pet. (U. S.) 545.

ARTICLE IV., SECTION 4.

"The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

I. "TO EVERY STATE," 214.

II. "A REPUBLICAN FORM OF GOVERNMENT," 214.

1. *In General*, 214.
2. *Legislative Control of Boundaries of Municipal Corporations*, 215.
3. *Conflicting Claims to Office of Governor*, 215.

III. POWER RESIDES IN CONGRESS, 215.

1. *In General*, 215.
2. *Discretion in Choice of Means*, 215.
3. *To Determine Which Is the Established Government*, 216.
4. *National Police Duty in a State Not Required*, 216.
5. *Power to Delegate Duty to the President*, 216.

I. "TO EVERY STATE." — The term "state" in this clause seems to be used in the idea of a people or political community as distinguished from a government, and is used in its geographical sense.

Texas v. White, (1868) 7 Wall. (U. S.) 721.

Federalist. — The inordinate pride of state importance has suggested to some minds an objection to the principle of a guaranty in the federal government, as involving an officious interference in the domestic concerns of the members. A scruple of this kind would deprive us of one of the principal advantages to be expected from union, and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the state constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by

violence. Towards the prevention of calamities of this kind, too many checks cannot be provided. The peace of society and the stability of government depend absolutely on the efficacy of the precautions adopted on this head. Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the state. The natural cure of an ill administration, in a popular or representative constitution, is a change of men. A guaranty by the national authority would be as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community. Hamilton, in *The Federalist*, No. XXI.

II. "A REPUBLICAN FORM OF GOVERNMENT" — 1. *In General.* — No particular government is designated by the clause as republican. Neither is the exact form to be guaranteed, in any manner especially designated. The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

Minor v. Happersett, (1874) 21 Wall. (U. S.) 175.

Power of people limited by constitutions. — "By the Constitution a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of

the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities." *In re Duncan*, (1891) 139 U. S. 461.

2. Legislative Control of Boundaries of Municipal Corporations. — The determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of the legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article IV. of the Constitution, the United States are bound to guarantee to every state in this Union. And whenever the Supreme Court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution.

Forsyth v. Hammond, (1897) 166 U. S. 519, reversing (C. C. A. 1896) 71 Fed. Rep. 443.

3. Conflicting Claims to Office of Governor. — The enforcement of the guaranty to every state of a republican form of government belongs to the political department, and cannot be said by the courts to have been denied by the action of a general assembly in a contest for the office of governor.

Taylor v. Beckham, (1900) 178 U. S. 578.

When, in pursuance of this provision of the Constitution, the President is called upon by the executive of a state to protect it against domestic violence, it appears to be his duty to give the required aid, especially when there is no doubt about the existence of the domestic violence; but where two per-

sons, each claiming to be governor, make calls respectively upon the President, under said clause of the Constitution, it of course becomes necessary for him to determine in the first place which of said persons is the constitutional governor of the state. *Governorship of Arkansas — Case of Baxter*, (1874) 14 Op. Atty-Gen. 394.

III. POWER RESIDES IN CONGRESS — **1. In General.** — The power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress.

Texas v. White, (1868) 7 Wall. (U. S.) 730.

2. Discretion in Choice of Means. — In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the state to its constitutional relations, under a republican form of government, and that no act be done, and no authority exerted, which is either prohibited or unsanctioned by the Constitution.

Texas v. White, (1868) 7 Wall. (U. S.) 729.

It rests with Congress to determine upon the means proper to be adopted to protect a state against domestic violence. They may

confer the power of deciding whether the exigency has arisen upon which the government of the United States is bound to interfere, on the President. *Luther v. Borden*, (1849) 7 How. (U. S.) 42.

3. To Determine Which Is the Established Government. — Under this article it rests with Congress to decide what government is the established one in a state. As the United States guarantee to each state a republican government, Congress must necessarily decide what government is established in a state before it can determine whether it is republican or not.

Luther v. Borden, (1849) 7 How. (U. S.) 42.

4. National Police Duty in a State Not Required. — This clause does not recognize the power of the United States or require them to do mere police duty in the states.

U. S. v. Cruikshank, (1875) 92 U. S. 556, *affirming* (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

5. Power to Delegate Duty to the President. — It was competent for Congress to provide, by the Act of Feb. 28, 1795, that, "in case of an insurrection in any state against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for; as he may judge sufficient to suppress such insurrection."

Luther v. Borden, (1849) 7 How. (U. S.) 43.

ARTICLE V.

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate."

Approval of the President. — To the contention that the Eleventh Amendment had not been proposed in the form prescribed by the Constitution, because Article I., section 7, requires the approval or disapproval of the President of "every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary," Chase, J., replied: "There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of amendments to the Constitution."

Hollingsworth v. Virginia, (1798) 3 Dall. (U. S.) 378.

ARTICLE VI.

"All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

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2. *Supremacy of Constitution over State Laws*, 219.

II. SUPREMACY OF ACTS OF CONGRESS AND TREATIES, 220.

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I. SUPREMACY OF FEDERAL CONSTITUTION — 1. In General. — This Constitution is the supreme law of the land, and no Act of Congress is of any validity which does not rest on authority conferred by that instrument.

U. S. v. Germaine, (1878) 99 U. S. 510.
See also *Choctaw Indians*, (1870) 13 Op. Atty.-Gen. 357; *Trial of Andrew Johnson*, 176.

There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases, there is no room for construction, no ground for argument; and in all such cases, not only the judiciary department, but every department, and indeed every private man who is required to act upon the subject-matter, must determine for himself

what the law of the land, as applicable to the case in hand, really is. He must obey the law, the whole law; and if the conflict between the Constitution and the Act of Congress — the higher and the lower law — be plain and unquestionable, he must, of necessity, disregard the one or the other. He cannot disregard the Constitution, for that is the supreme law; and therefore he must obey the Constitution even though, in doing so, he must disregard a statute. *Rights of Settlers under Pre-exemption Laws*, (1861) 10 Op. Atty.-Gen. 61.

2. Supremacy of Constitution over State Laws. — Where a state law is assailed as repugnant to the Constitution of the United States, and on its face such Act is seemingly within the power of the state to adopt, but its necessary effect and operation is to usurp a power granted by the Constitution to the Government of the United States, it must follow, from the paramount nature of the Constitution of the United States, that the Act is void. In such a case the result of the test of necessary operation and effect is to demonstrate the want of power, because of the controlling nature of the limitations imposed on the states by the Constitution of the United States.

McCray v. U. S., (1904) 195 U. S. 60. See also *Northern Securities Co. v. U. S.*, (1904) 193 U. S. 344; *Ex p. Siebold*, (1879) 100 U. S. 398; *New York v. Tax Com'rs*, (1862) 2

Black (U. S.) 632; *Cohen v. Virginia*, (1821) 6 Wheat. (U. S.) 381; *M'Culloch v. Maryland*, (1819) 4 Wheat. (U. S.) 405, 406; *Lick v. Faulkner*, (1864) 25 Cal. 418.

It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. *Hauenstein v. Lynham*, (1879) 100 U. S. 490.

The mode or manner in which the police power may be exercised to safeguard the public health and the public safety is within the discretion of the state, subject, so far as the federal power is concerned, only to the condition that no rules prescribed by a state, nor any regulation adopted by a local governmental agent acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Jacobson v. Massachusetts*, (1905)

107 U. S. 25. See also *Connolly v. Union Sewer Pipe Co.*, (1902) 184 U. S. 556, *affirming* *Union Sewer Pipe Co. v. Connolly*, (1900) 99 Fed. Rep. 354.

"It has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself but of the laws made in pursuance of it. The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." *Gibbons v. Ogden*, (1824) 9 Wheat. (U. S.) 210.

The Fourteenth Amendment, like the original Constitution, is the supreme law of the land, and therefore, within the limit of its operation, the national government is superior to that of the state. *In re Ah Lee*, (1880) 5 Fed. Rep. 901.

II. SUPREMACY OF ACTS OF CONGRESS AND TREATIES — 1. In General. — The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution or some treaty made under the authority of the United States. In every case, the Act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 210.

A treaty under the Constitution of the United States may have a double aspect and operation: First, that accompanying it as a compact between sovereign powers and governed by the law of nations; and, secondly, one equivalent to an Act of the legislature, our Constitution declaring a treaty to be the law of the land. * * * In the latter case it operates of itself, without the aid of any legislative provision; but in the former the legislature must execute the contract before it can become a rule for the courts. *In re Metzger*, (1847) 17 Fed. Cas. No. 9,511.

A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be, the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our govern-

ment. *Turner v. American Baptist Missionary Union*, (1852) 5 McLean (U. S.) 344, 24 Fed. Cas. No. 14,251.

Treaties with Indian tribes have the same dignity and effect as a treaty with a foreign and independent nation. Since the commencement of the government, treaties have been made with the Indians, and the treaty-making power has been exercised in making them. They are treaties, within the meaning of the Constitution, and as such are the supreme laws of the land. *Turner v. American Baptist Missionary Union*, (1852) 5 McLean (U. S.) 344, 24 Fed. Cas. No. 14,251.

Conspiracies against treaty rights of aliens. — Section 5519, R. S., so far as it is applicable to a conspiracy to deprive certain Chinese resident aliens of their right to reside and pursue their lawful vocations, thereby depriving them of their rights and privileges under the laws, and of the equal protection of the laws, guaranteed to them under a treaty with China, is constitutional. *In re Baldwin*, (1886) 27 Fed. Rep. 187.

Conflict with "public law." — In case an Act of Congress should happen to conflict with a dogma of the "public law," so called,

the dogma must yield. Though such a conflict may lead to diplomatic reclamations, and possibly to war, we cannot make the Act of Congress cease to be the law of the land, bind-

ing upon the people and their judges. Appropriation of Captured Property by War, etc., Departments, (1863) 10 Op. Atty.-Gen. 521.

2. Supremacy of Acts of Congress over State Laws—*a. IN GENERAL.*—The United States is a government with authority extending over the whole territory of the Union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.

Tennessee v. Davis, (1879) 100 U. S. 263. See also *White v. Hart*, (1871) 13 Wall. (U. S.) 650; *Tarble's Case*, (1871) 13 Wall. (U. S.) 406.

The Constitution and laws of the United States extend and are paramount over all the territory of every state, and cannot be annulled nor the force of either of them be in any degree impaired by any law of a state, no matter in what form or with what solemnity such law may have been enacted, or by what name it may be designated; whether it be a constitution, an ordinance, a statute, or a resolve. So far as it conflicts with the Constitution, or with any valid law of the United States, it is utterly nugatory, and can afford no legal protection whatever to those who act under it. *Charge of Grand Jury*, (1861) 1 Sprague (U. S.) 602, 30 Fed. Cas. No. 18-273.

An act done by an officer or agent of the United States in and about a matter solely within the federal control, and in pursuance of an authority given by the laws of the United States, is not an offense against the laws of a state. *In re Fair*, (1900) 100 Fed. Rep. 151.

Wherever exists a concurrent right of legislation in the states and in Congress, and the latter has exercised its power, there remains in the states no authority to legislate on the same matter. *Waite v. Dowley*, (1876) 94 U. S. 532.

If the power of a state and that of the federal government come in conflict in matters relating to commerce, the latter must control and the former yield. *Escanaba, etc., Transp. Co. v. Chicago*, (1882) 107 U. S. 683, affirming (1882) 12 Fed. Rep. 777.

Federalist.—It merits particular attention in this place that the laws of the confederacy, as to the enumerated and legitimate objects of its jurisdiction, will become the supreme law of the land; to the observance of which all officers, legislative, executive, and judicial, in each state, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates of the respective members will

be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws. Hamilton, in *The Federalist*, No. XXVII.

This clause is "only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers. * * * A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies and the individuals by whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy. But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered [giving Congress the power to make all laws necessary and proper for carrying into execution the constitutional powers of the United States], only declares a truth which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation that it expressly confines this supremacy to laws made pursuant to the Constitution; which I mention merely as an instance of caution in the convention; since that limitation would have been to be understood, though it had not been expressed." Hamilton, in *The Federalist*, No. XXXIII.

All Constitutional Laws are binding on the people in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional Act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment, and when so passed it becomes the supreme law of the land and operates by its own force on the subject-matter in whatever state or territory it may happen to be. It cannot be successfully urged that such a law cannot operate upon the subject-matter of its enactment without the express consent of the people of a new state where it may happen to be.

Pollard v. Hagan, (1845) 3 Hbw. (U. S.) 224. See also Pensacola Tel. Co. v. Western Union Tel. Co., (1877) 96 U. S. 9, *affirming* (1875) 2 Woods (U. S.) 643, 19 Fed. Cas.

No. 10,960; Hepburn v. Griswold, (1869) 8 Wall. (U. S.) 611, *affirming* Griswold v. Hepburn, (1865) 2 Duv. (Ky.) 20; Ableman v. Booth, (1858) 21 How. (U. S.) 519.

b. REPUGNANCY MUST BE DIRECT AND POSITIVE. — A state statute, although enacted in pursuance of a power not surrendered to the general government, must in the execution of its provisions yield, in case of conflict, to a statute constitutionally enacted under authority conferred upon Congress; but it is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.

Missouri, etc., R. Co. v. Haber, (1898) 169 U. S. 623.

"The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such Acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to laws of Congress, made in pursuance of the Constitution or some treaty made under the authority of the United

States. In every such case, the Act of Congress or treaty is supreme, and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. * * * We agree that in the application of this principle of supremacy of an Act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together, and also that the Act of Congress should have been passed in the exercise of a clear power under the Constitution, such as that in question." *Sinnot v. Davenport*, (1859) 22 How. (U. S.) 242.

c. IMMUNITY FROM PROSECUTION FOR TESTIFYING. — The immunity given by an Act of Congress which provides, "but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify," is clearly intended to be general, and to be applicable whenever and in whatever court such prosecution may be had, whether state or federal.

Brown v. Walker, (1896) 161 U. S. 608, *affirming* (1895) 70 Fed. Rep. 46.

d. QUARANTINE REGULATIONS. — A state statute which, as interpreted by the Supreme Court of the state, empowers the state board of health to exclude healthy persons from a locality infested with a contagious and infectious disease, such power applying as well to persons seeking to enter the infected place, whether they come from without or within the state, does not conflict with Acts of Congress relating to foreign immigration into the United States, and conferring quarantine powers upon the marine hospital service.

Compagnie Francaise, etc., v. Louisiana State Board of Health, (1902) 186 U. S. 385, *affirming* (1899) 51 La. Ann. 845, wherein the court said: "Without undertaking to analyze the provisions of these Acts, it suffices to say that, after scrutinizing them, we think they do not purport to abrogate the quarantine laws of the several states, and that the safeguards which they create and the regulations which they impose on the introduction of immigrants are ancillary, and subject to

such quarantine laws. So far as the Act of 1893 is concerned, it is manifest that it did not contemplate the overthrow of the existing state quarantine systems and the abrogation of the powers on the subject of health and quarantine exercised by the states from the beginning, because the enactment of state laws on these subjects would, in particular instances, affect interstate and foreign commerce."

3. Later Statute or Treaty Supersedes Prior Treaty or Statute—*a.* IN GENERAL.

—By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

Whitney v. Robertson, (1868) 124 U. S. 194. See also *U. S. v. Lee Yen Tai*, (1902) 185 U. S. 220; *Horne v. U. S.*, (1892) 143 U. S. 570; *In re Ah Lung*, (1883) 18 Fed. Rep. 29.

"A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court." *Foster v. Neilson*, (1829) 2 Pet. (U. S.) 313. See also *Chinese Exclusion Case*, (1889) 130 U. S. 600, *affirming In re Chae Chan Ping*, (1888) 36 Fed. Rep. 431; *Chew Heong v. U. S.*, (1884) 112 U. S. 540; *In re Ah Lung*, (1883) 18 Fed. Rep. 29.

A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty. *Cherokee Tobacco*, (1870) 11 Wall. (U. S.) 621.

A treaty, assuming it to be made conformably to the Constitution in substance and form, has the effect of repealing all preceding federal law in conflict with it, whether unwritten, as law of nations or admiralty and common law, or written as Acts of Congress. *Copyright Convention with Great Britain*, (1854) 6 Op. Atty-Gen. 293.

When treaty rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. *Head Money Cases*, (1884) 112 U. S. 598, *affirming* (1883) 18 Fed. Rep. 135. See also *In re Metzger*, (1847) 17 Fed. Cas. No. 9,511.

"The Constitution of the United States declares a treaty to be the supreme law of the land. Of consequence, its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by, the executive of each nation; and therefore, whatever the decision of this court may be relative to the rights of parties litigating before it, the claim upon the nation, if unsatisfied, may still be asserted. But yet, where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights, and is as much to be regarded by the court, as an Act of Congress, and, although restoration may be an executive when viewed as a substantive act, independent of and unconnected with other circumstances, yet to condemn a vessel, the restoration of which is directed by a law of the land, would be a direct infraction of that law, and, of consequence, improper." *U. S. v. Schooner Peggy*, (1801) 1 Cranch (U. S.) 103.

Only in cases purely political.—Congress has no constitutional right to interfere with rights under treaties, except in cases purely political. *U. S. v. Reese*, (1879) 5 Dill. (U. S.) 405, 27 Fed. Cas. No. 16,137.

More international comity, not incorporated in any convention between the United States and the foreign powers, must yield to a statute with which it is in conflict. *The Kestor*, (1901) 110 Fed. Rep. 448.

Federalist. — Others, though content that treaties should be made in the mode proposed, are averse to their being the supreme laws of the land. They insist, and profess to believe, that treaties, like acts of assembly, should be repealable at pleasure. This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it. They who make laws may, without doubt,

amend or repeal them; and it will not be disputed that they who make treaties may alter or cancel them; but still let us not forget that treaties are made, not by only one of the contracting parties, but by both; and, consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. The proposed Constitution, therefore, has not in the least extended the obligation of treaties. They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period or under any form of government. Jay, in *The Federalist*, No. LXIV.

When Statute Is Constitutional. — The provisions of an Act of Congress, passed in the exercise of its constitutional authority, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty.

Fong Yue Ting v. U. S., (1893) 149 U. S. 720. See also *Choctaw Indians*, (1870) 13 Op. Atty.-Gen. 357.

Treaty stipulations between the United States and foreign nations are not restrictive of the constitutional power of Congress. They have the force of law, but, like statutes, are superseded in American courts by subsequent Acts of Congress conflicting with them. *The Kestor*, (1901) 110 Fed. Rep. 448.

"This provision of our Constitution has made treaties part of our municipal law. But it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise

enacted. No such declaration is made, even in respect to the Constitution itself. It is named in conjunction with treaties and Acts of Congress, as one of the supreme laws, but no supremacy is in terms assigned to one over the other. And when it became necessary to determine whether an Act of Congress repugnant to the Constitution could be deemed by the judicial power an operative law, the solution of the question was found by considering the nature and objects of each species of law, the authority from which each emanated, and the consequences of allowing or denying the paramount effect of the Constitution." *Taylor v. Morton*, (1855) 2 Curt. (U. S.) 454, 23 Fed. Cas. No. 13,799.

b. MUST BE A CLEAR CASE OF CONFLICT. — It is the duty of the courts not to construe an Act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction.

Lam Moon Sing v. U. S., (1895) 158 U. S. 549.

The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States. *U. S. v. Forty-Three Gallons Whiskey*, (1883) 108 U. S. 496.

"Congress may pass any law it pleases, if it is otherwise constitutional, notwithstanding it conflicts, and notwithstanding to whatever degree, greater or less, it conflicts, with an existing treaty with a foreign nation. Such legislation is not to be imputed to the government upon any doubtful ground, and every presumption is to be indulged against such legislation. *Ropes v. Clinch*, (1871) 8 Blatchf. (U. S.) 304, 20 Fed. Cas. No. 12,041.

c. VIOLATION OF TREATY BY STATUTE A MATTER OF INTERNATIONAL CONCERN. — If a treaty is violated by a general statute, it is a matter of international concern, which must be determined by treaty, or by such other means as enable one state to enforce upon another the obligations of a treaty. A court has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard.

Botiller v. Dominguez, (1889) 130 U. S. 247.

d. EXEMPTION OF COASTWISE STEAMERS FROM PILOTAGE. — A treaty between Great Britain and the United States provides that “no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States.” Neither the exemption of coastwise steam vessels from pilotage, resulting from the law of the United States, nor any lawful exemption of coastwise vessels created by the state law, concerns vessels in the foreign trade, and, therefore, any such exemptions do not operate to produce a discrimination against British vessels engaged in foreign trade, and in favor of vessels of the United States in such trade.

Olsen v. Smith, (1904) 195 U. S. 341, *affirming* (Tex. Civ. App. 1902) 68 S. W. Rep. 320.

e. CHANGE IN RATE OF IMPORT DUTY. — A statute declaring that “Russia hemp imported to this country shall pay a duty of forty dollars per ton” was held to repeal the stipulation in a prior treaty with Russia, which in effect declared that the duty on Russia hemp should not be more than twenty-five dollars.

Ropes v. Clinch, (1871) 8 Blatchf. (U. S.) 304, 20 Fed. Cas. No. 12,041. See also *Taylor v. Morton*, (1855) 2 Curt. (U. S.) 454, 23 Fed. Cas. No. 13,799.

f. DISCRIMINATION IN TONNAGE TAXES. — By article 9 of the treaty of Dec. 20, 1827, between the United States and the Hanseatic Republics, “the contracting parties * * * engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party.” Section 14 of the Act of June 26, 1884, provided “that in lieu of the tax on tonnage of thirty cents per ton per annum, heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports.” It was held that a steamship company clearing from Bremen, which port is in the Hanseatic Republics, was liable for the tonnage duties imposed by the statute, as it was of later date than the treaty.

North German Lloyd Steamship Co. v. Hedden, (1890) 43 Fed. Rep. 17.

g. CRIMINAL STATUTE APPLYING TO INDIAN COUNTRY. — A criminal statute applying to Indian country supersedes a prior treaty with the tribe in conflict therewith.

Cherokee Tobacco, (1870) 11 Wall. (U. S.) 621.

4. Treaties Binding on the States — a. IN GENERAL. — The treaty-making power has been surrendered by the states and given to the United States, and treaties are as binding within the territorial limits of the states as they are elsewhere throughout the domain of the United States.

Baldwin v. Franks, (1887) 120 U. S. 682. See also *To Abolish Disabilities of Aliens*, *supra*, p. 31.

The states have surrendered the treaty-making power to the general government, and vested it exclusively in the President and Senate; and when duly exercised by the

President and Senate the treaty resulting becomes the supreme law of the land, to which not only state laws but state constitutions are in express terms subordinated. *In re Baldwin*, (1886) 27 Fed. Rep. 188. See also *In re Tibureio Parrott*, (1880) 1 Fed. Rep. 501.

A Treaty Can Totally Annihilate any part of the constitution or laws of any of the individual states that is contrary to the treaty.

Ware v. Hylton, (1796) 3 Dall. (U. S.) 243. See also *Treaties — Fisheries*, (1898) 22 Op. Atty.-Gen. 217; *Copyright Convention with Great Britain*, (1854) 6 Op. Atty.-Gen. 293.

A state cannot legislate so as to interfere with the operation of a treaty, or limit or deny the privileges or immunities guaranteed by it to aliens residing in this country. *Baker v. Portland*, (1879) 5 Sawy. (U. S.) 566, 2 Fed. Cas. No. 777.

It Is the Declared Duty of the State Judges to determine any constitution or laws of any state, contrary to a treaty made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct.

Ware v. Hylton, (1796) 3 Dall. (U. S.) 236, wherein the court said: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state, which is the fundamental law of the state, and paramount to its legislature, must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the

declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."

b. STATE LEGISLATION AFFECTING SUBJECTS OF TREATY STIPULATIONS —

(1) *Prohibiting Sale of Foreign Bonds Which Are Subjects of Lotteries.* — Foreign government bonds are salable, and ought to be treated as other articles of commerce as a rule. But when those bonds are coupled with conditions and stipulations which change their character from a simple government bond for the payment of a certain sum of money to a species of lottery ticket, they are not salable within the state which prohibits the sale of any lottery tickets within the state. Such a state statute does not violate any treaty stipulations.

Ballock v. State, (1890) 73 Md. 8.

(2) *Disturbing Indians in Their Possession of Lands.* — Treaties with Indian tribes which recognize their lawful possession of lands embraced within reservations, and agree never to claim the same, or to disturb the nation in the free use and enjoyment thereof, like all other public treaties entered into by the United States, are a parcel of the paramount law and must prevail over all state laws in conflict with them. Any act of a state legislature, the execution of which would dispossess the Indians of the reservations, or any part of them, or which should materially disturb their occupancy, would therefore be illegal.

Fellows v. Denniston, (1861) 23 N. Y. 427.

(3) *Prohibiting White Persons Residing Within Indian Nation.* — A Georgia statute passed Dec. 22, 1830, enacting that "all white persons residing

within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor," was held to be void, and a judgment entered against one who had entered the Cherokee nation as a missionary under the authority of the President of the United States, and had not been required by him to leave it, and was engaged with the permission and approval of the Cherokee nation in preaching the gospel, was invalid, as the whole intercourse between the United States and the nation was by the United States Constitution and laws vested in the government of the United States.

Worcester v. Georgia, (1832) 6 Pet. (U. S.) 515, wherein the court said: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, adopted and sanctioned the previous treaties with the Indian nations, and consequently admitted their rank among those powers who were capable of making treaties." Under the treaties with the Cherokee nation, the court said that it was a distinct community, occupying its own territory,

with boundaries accurately described, in which the laws of Georgia could have no force, and which the citizens of Georgia had no right to enter, but with the consent of the Cherokees themselves, or in conformity with treaties and with the Acts of Congress. The whole intercourse between the United States and this nation was by the National Constitution and laws vested in the government of the United States.

(4) *Confinement of Free Negroes Employed on Vessels.* — A state statute which declared "that if any vessel shall come into any port or harbor of this state, from any other state or foreign port, having on board any free negroes or persons of color, as cooks, stewards, or mariners, or in any other employment on board said vessel, such free negroes or persons of color shall be seized and confined in gaol until such vessel shall clear out and depart from this state; and that when said vessel is ready to sail the captain of said vessel shall be bound to carry away the said free negro, or free person of color, and to pay the expenses of his detention; and, in case of his neglect or refusal so to do, he shall be liable to be indicted, and on conviction thereof shall be fined in a sum not less than one thousand dollars, and imprisoned not less than two months; and such free negroes, or persons of color, shall be deemed and taken as absolute slaves, and sold," was held to be an express violation of an existing commercial convention with Great Britain.

Elkison v. Delieesseline, (1823) Brun. Col. Cas. (U. S.) 431, 8 Fed. Cas. No. 4,366. But see *Roberts v. Yates*, (1853) 16 Law Rep. 49, 20 Fed. Cas. No. 11,919.

(5) *Specially Directed Against Mongolians* — (a) *Prohibiting Landing in the State* — A treaty with China which, reciprocating privileges granted to citizens of the United States, allowed Chinese subjects visiting or residing in the United States the right to enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by citizens or subjects of the most favored nation, was held to be violated by the action of the state immigration commissioner, under the authority of a state statute, prohibiting the landing of certain Chinese persons under conditions which did not bring the case within the police power of the state to exclude convicts, lepers, and

persons incurably diseased, and paupers and persons who, from physical causes, are likely to become a public charge.

In re Ah Fong, (1874) 3 Sawy. (U. S.) 144, 1 Fed. Cas. No. 102.

(b) **Regulating Laundries.** — A municipal ordinance, passed to regulate the establishment, maintenance, and licensing of laundries within certain designated limits, and prescribing punishment for establishing or carrying on the business of a laundry in violation of its provisions, and declaring that after its passage it shall be unlawful for any person "to establish, maintain, or carry on any laundry within that portion of the city and county of San Francisco lying and being east of Ninth and Larkin streets, without having first obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than twelve citizens and taxpayers in the block in which the laundry is proposed to be established, maintained, or carried on," was held invalid as to a Chinese alien who, under the treaty with China, was entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country had treaty relations.

In re Quong Woo, (1882) 13 Fed. Rep. 229.

(c) **Prohibiting Fishing.** — A California statute which provides that "all aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind, for the purpose of selling or giving to another person to sell," violates the treaty provision with China that the Chinese shall "enjoy the same privileges, immunities, and exemptions" as are "enjoyed by the citizens or subjects of the most favored nation."

In re Ah Chong, (1880)-2 Fed. Rep. 738.

(d) **Prohibiting Removal of Remains of Deceased Persons.** — A California statute entitled "An Act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," providing that "it shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose," for which permit the sum of \$10 is to be paid, is not in conflict with the treaty between the United States and China which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience, and shall be free from all disabilities or persecutions on account of their religious faith or worship." Conceding that the religious sentiment of the Chinese requires that they shall remove the remains of their deceased friends to China for final burial, there is nothing in the provision forbidding or unduly obstructing the performance of that rite or religious duty, and nothing that does not equally apply to other aliens and citizens.

In re Wong Yung Quy, (1880) 2 Fed. Rep. 624,

(e) **Prohibiting Employment on Public Works.** — An Oregon statute providing that "it shall be unlawful to employ any Chinese laborers on any street, or part of street, of any city or incorporated town of this state, or on any public works or public improvement of any character, except as a punishment for crime, and all contracts which any person or corporation may have for the improvement of any such street, or part of street, or public works or improvements of any character, shall be null and void from and after the date of any employment of any Chinese laborers thereon by the contractor," was held invalid, as it conflicted with the treaty with China, which recognized the right of the Chinese to change their home and allegiance and to visit this country, and to become permanent residents thereof, and as such residents guaranteed to them all the privileges and immunities that may be enjoyed here by the citizens or subjects of any nation.

Baker v. Portland, (1879) 5 Sawy. (U. S.) 566, 2 Fed. Cas. No. 777.

(f) **Prohibiting Employment by Corporations.** — The California constitution provides that "no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." In obedience to this mandate, the legislature passed an Act entitled "An Act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations." The constitutional and statutory provisions are in conflict with treaty stipulations with China giving to the Chinese the right to emigrate freely to the United States for the purpose of permanent residence, and stipulating that they shall enjoy the same privileges, immunities, and exemptions in respect to residence, as may be enjoyed by the citizens and subjects of the most favored nation.

In re Tiburcio Parrott, (1880) 1 Fed. Rep. 503.

c. **COVENANT IN DEED AGAINST CONVEYING TO CHINESE PERSONS.** — A covenant in a deed: "It is also understood and agreed by and between the parties hereto, their heirs and assigns, that the party of the first part shall never, without the consent of the party of the second part, his heirs or assigns, rent any of the buildings or ground owned by said party of the first part, and fronting on said East Main street, to a Chinaman or Chinamen," is void as being in violation of the treaty between the United States and China of Nov. 17, 1880, providing that Chinese subjects "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

Gandolfo v. Hartman, (1892) 49 Fed. Rep. 181.

III. STATE CONTROL OF GOVERNMENT PROPERTY — 1. National Soldiers' Home.

— The lands and property employed for a national soldiers' home, over which exclusive jurisdiction has not been ceded to the United States, constitute instrumentalities for the execution of the powers of the general government, and are therefore exempt from such control of the state as would defeat or impair their use for those purposes. The management and officers are agencies of the

United States, and as such are exempt from any interference by the authorities or courts of the state, in their control, discipline, or government of the home or property.

In re Kelly, (1895) 71 Fed. Rep. 553.

2. Corporations Organized under Laws of Congress. — The mere fact that a railroad corporation was organized under the laws of Congress does not exempt it from state control in respect to rates for local freight. Congress can wholly remove such a corporation from state control, but in the absence of something in the statutes indicating an intention on the part of Congress to so remove it, the state has the power to prescribe the rates for all local business carried by it. Of course, that decision is controlling.

Reagan v. Mercantile Trust Co., (1894) 154 U. S. 413. See also *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 170.

3. Attachment of Funds. — Money in the hands of a disbursing officer is as much the money of the United States as if it had not been drawn from the treasury, and is not liable to attachment by the creditors of the parties to whom it is payable.

Buchanan v. Alexander, (1846) 4 How. 670; *Attachment of Funds Due — Government Contractors*, (1872) 13 Op. Atty-Gen. 567. (U. S.) 20. See also *Averill v. Tucker*, (1824) 2 Cranch (C. C.) 544, 2 Fed. Cas. No. 567.

IV. STATE TAXATION — 1. Of Government Property — a. IN GENERAL. — Lands within a state which, pursuant to Acts of Congress for laying and collecting all direct taxes, are sold, struck off, and purchased by the United States for the amount of taxes thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are not liable to be taxed, under authority of the state, while so owned by the United States.

Van Brocklin v. Tennessee, (1886) 117 U. S. 153, wherein the court said: "While the power of taxation is one of vital importance, retained by the states, not abridged by the grant of a similar power to the government of the Union, but to be concurrently exercised by the two governments, yet even this power of a state is subordinate to, and may be controlled by, the Constitution of the United States. That Constitution and the laws made in pursuance thereof are supreme; they control the constitutions and laws of the respective states and cannot be controlled by them. The people of a state give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular state, but by the people of all the states; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress

to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a state on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy; the power to destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Whether or not a state can tax land within the state belonging to the United States is not decided, but if it has that right it cannot enforce the payment of the tax from the United States by seizing the personal property or means used by the general government in performance of the duties and in execution

of the powers intrusted to it. *U. S. v. Weise*, (1851) 2 Wall. Jr. (C. C.) 72, 28 Fed. Cas. No. 16,659.

Until the purchase price of property purchased from the United States has been fully

paid, and the whole equitable interest in the property vests in the purchaser, and nothing remains but for the United States to issue its patent pursuant to the agreement, the property is not subject to state taxation. *U. S. v. Milwaukee*, (1893) 100 Fed. Rep. 829.

b. WHARFAGE CHARGES ON PROPERTY OF UNITED STATES. — The state harbor commissioners of California are charged by the laws of that state with the supervision and control of the wharves and landings in the harbor of San Francisco, with the right to collect dockage, wharfage, rent, or toll. The imposition of a toll or charge by such commissioners on merchandise, being the property of the United States, passing to or over the wharves at San Francisco, is constitutional and valid; the charge being for a service rendered, the government is not entitled to such services free of toll. Such toll or charge is not a tax upon the instrumentalities and agencies of the general government, but is a charge for the use of property and facilities furnished the government by the state of California.

State Toll on Government Property — Wharfage Charges, (1900) 23 Op. Atty-Gen. 299.

2. Of Federal Agencies — a. IN GENERAL. — The power of state taxation does not extend to the instruments of the federal government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution.

Ward v. Maryland, (1870) 12 Wall. (U. S.) 426.

"Unquestionably the taxing power of the states is very comprehensive and pervading, but it is not without limits. State tax laws cannot restrain the action of the national government, nor can they abridge the operation of any law which Congress may constitutionally pass. They may extend to every object of value within the sovereignty of the state, but they cannot reach the administration of justice in the federal courts, nor the collection of the public revenue, nor interfere with any constitutional regulation of commerce." *Savings Soc. v. Coite*, (1867) 6 Wall. (U. S.) 605.

"Instruments of government, such as are referred to, are the officers, as such, execu-

tive, legislative, and judicial, appointed or chosen to enact, execute, and expound the laws, and the public buildings erected and occupied for the uses of the government. Federal machinery is much more multifarious than that of the states, as the government of the United States is charged with the national defense, and of course our forts, navy yards, public ships, and the like fall within that exemption. Public corporations also fall within that exemption, but railways are private corporations, just as much as steamship and steamboat companies or canal corporations, where the stock belongs to the corporators, or as much as moneyed manufacturing or business corporations, all of which are created to promote the public good." *Sweatt v. Boston, etc., R. Co.*, (1871) 3 Cliff. (U. S.) 339, 23 Fed. Cas. No. 13,684.

b. OF FEDERAL OFFICER'S SALARY. — The compensation of an officer of the United States is fixed by a law made by Congress, and any law of a state imposing a tax upon the office, diminishing the recompense, is in conflict with the law of the United States which secures the allowance to the officer.

Dobbins v. Erie County, (1842) 16 Pet. (U. S.) 435.

The salary of a judicial officer of the United States is not subject to taxation by a state. *Purnell v. Page*, (1903) 128 Fed. Rep. 496.

c. ON TELEGRAPH MESSAGES SENT BY FEDERAL OFFICERS. — Congress, to facilitate the erection of telegraph lines, has by statute authorized the use of the public domain and the military and post roads, and the crossing of

navigable streams and waters of the United States for that purpose. As a return for this privilege those who avail themselves of it are bound to give the United States precedence in the use of their lines for public business at rates to be fixed by the postmaster-general. A specific tax imposed by the state on each message sent by public officers on the business of the United States is a tax upon a governmental agency, and therefore void.

Western Union Tel. Co. v. Texas, (1881) 105 U. S. 464.

d. ON PROPERTY OF CORPORATION ORGANIZED UNDER ACT OF CONGRESS.

— A state tax on the property of a railroad company organized under an Act of Congress, under which it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and grants were made to it and privileges conferred upon it, upon condition that it should at all times transmit dispatches over its telegraph lines, and transport mails, troops, and munitions of war, supplies, and public stores upon the railroad for the government whenever required to do so by any department thereof, and that the government should at all times have the preference of the use of the same for all such purposes, was held not to be invalid as a tax upon the agency of the national government. The tax was not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being, nor was it laid upon any act which the company had been authorized to do, but it was exclusively upon the real and personal property of the agent, taxed in common with all other property in the state of a similar character.

Union Pac. R. Co. v. Peniston, (1873) 18 Wall. (U. S.) 31, wherein the court said: "Exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the

government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

e. OF STATE CORPORATION PERFORMING SERVICES FOR NATIONAL GOVERNMENT. — Congress may, in the exercise of powers incidental to the express powers conferred, make or authorize contracts with individuals or corporations for services to the government; may grant aid by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aid not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any state taxation which will really prevent or impede their performance. But because of the advancement by the government of large sums in aid of the construction of the railroad, and the making of large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation independently of those grants, it cannot be claimed that the railroad, owing its being to state law, and indebted for these benefits to the consent and active interposition of the state legislature, has a constitutional right to hold its property exempt from taxation without any

legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

Thomson v. Union Pac. R. Co., (1869) 9 Fed. Rep. 389, *affirmed* on other grounds Wall. (U. S.) 588. See also *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 (1886) 118 U. S. 394.

f. ON BANK OF THE UNITED STATES. — A state statute imposing a tax on the operation of a branch within the state, of the bank of the United States, was held to be unconstitutional and void. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This rule does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens may hold in the institution, in common with other property of the same description throughout the state.

McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 436.

3. Of United States Obligations—*a.* IN GENERAL. — A state cannot, in the exercise of the power of taxation, tax obligations of the United States.

Weston v. Charleston, (1829) 2 Pet. (U. S.) 449; *New York v. Tax Com'rs*, (1862) 2 Black (U. S.) 620; *Home Ins. Co. v. New York*, (1890) 134 U. S. 594.

"Want of authority in the states to tax the securities of the United States issued in the exercise of the admitted power of Congress to borrow money on credit of the United States is equally certain, although there is no express prohibition in the Constitution to that effect." *Hamilton Mfg. Co. v. Massachusetts*, (1867) 6 Wall. (U. S.) 639.

United States notes. — It is within the power of Congress to exempt from state tax-

tion United States notes issued under Acts of Congress and intended to circulate as money. *New York Bank v. New York County*, (1868) 7 Wall. (U. S.) 30.

Certificates of indebtedness issued by the United States are not liable to state taxation. The principle of exemption is, that the states cannot control the national government within the sphere of its constitutional powers, for there it is supreme; and cannot tax its obligations for payment of money, issued for purposes within that range of powers, because such taxation necessarily implies the assertion of the right to exercise such control. *Banks v. Connelly*, (1868) 7 Wall. (U. S.) 25.

b. OF CAPITAL STOCK INVESTED IN UNITED STATES BONDS. — A state statute requiring corporations having capital stock divided into shares to pay a specified tax on the excess of the market value of the capital stock over the value of the real estate and machinery, as under the state constitution and laws such a tax was a tax on the franchise and privileges of the corporation and not a tax on the property, is not invalid as to any excess of the capital stock invested in United States bonds, though such bonds were declared by Congress to be exempt from state taxation.

Hamilton Mfg. Co. v. Massachusetts, (1867) 6 Wall. (U. S.) 632.

A state statute requiring savings banks and societies for savings to pay annually to the state treasury, for the use of the state, a sum equal to three-fourths of one per cent. of the total amount of deposits in such institution on the first day of July in each year, is a tax on the franchises and privileges of

such a society, and not a tax upon its property; and the fact that deposits were invested and held in securities of the United States declared by Congress to be exempt from taxation, does not exempt such deposits from the tax imposed by the state statute. *Savings Soc. v. Coite*, (1867) 6 Wall. (U. S.) 602. See also *Provident Sav. Inst. v. Massachusetts*, (1867) 6 Wall. (U. S.) 612.

c. OF LEGACY CONSISTING OF UNITED STATES BONDS. — Under the inheritance tax laws of a state, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form.

Plummer v. Coler, (1900) 178 U. S. 117.

A state inheritance tax, imposed under the provisions of a state statute, is not void to the extent that the assessment may be based upon the value of United States bonds in-

cluded in the property of the decedent. Such a tax is not imposed upon the bonds, but it is only upon the privilege of acquiring property by inheritance. *Wallace v. Myers*, (1889) 38 Fed. Rep. 185.

d. SEIZURE OF BONDS FOR TAXES DUE ON UNEXEMPT PROPERTY. — There is nothing in the exemption of government bonds from taxation which prevents them from being seized for taxes due upon unexempt property.

Scottish Union, etc., Co. v. Bowland, (1905) 196 U. S. 632.

4. National Banks — a. SUBJECT TO PARAMOUNT AUTHORITY OF CONGRESS. — National banks are instrumentalities of the federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created.

Davis v. Elmira Sav. Bank, (1896) 161 U. S. 283. See *Power to Incorporate National Banks*, 8 FED. STAT. ANNOT. 677.

"Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the secretary of the treasury and the comptroller of the currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of

capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." *Easton v. Iowa*, (1903) 188 U. S. 238.

For the laws of Congress relating to national banks, and notes on aiding or conflicting state legislation, see generally the title *National Banks*, 5 FED. STAT. ANNOT. 75.

b. WHEN SUBJECT TO STATE LAWS. — National banks are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisitions and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

Louisville First Nat. Bank v. Kentucky, (1869) 9 Wall. (U. S.) 362.

These two propositions, which are distinct yet harmonious, practically contain a rule and an exception; the rule being the operation of general state laws upon the dealings and contracts of national banks; the excep-

tion being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States. *McClellan v. Chipman*, (1896) 164 U. S. 357.

National banks organized under the Acts of Congress are subject to state legislation, except where such legislation is in conflict with some Act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United

States, or interferes with the purposes of their creation. *Waite v. Dowley*, (1876) 94 U. S. 533. See also *Farmers', etc., Nat. Bank v. Dearing*, (1875) 91 U. S. 33. But see *Pittsburg v. Pittsburg First Nat. Bank*, (1867) 55 Pa. St. 48.

V. CONDITIONS ARISING FROM ATTEMPTED SECESSION — 1. Ordinance of Secession Void.— An ordinance of secession was an absolute nullity, and of itself alone affected neither the jurisdiction of the Supreme Court of the state nor its relation to the appellate power of the Supreme Court of the United States.

White v. Cannon, (1867) 6 Wall. (U. S.) 450. See also *Keith v. Clark*, (1878) 97 U. S. 461; *Ford v. Swiget*, (1878) 97 U. S. 605; *U. S. v. Cathcart*, (1864) 1 Bond (U. S.) 556, 25 Fed. Cas. No. 14,756; *Shortridge v. Macon*, (1867) Chase (U. S.) 136, 22 Fed. Cas. No. 12,812; *Keppel v. Petersburg R. Co.*, (1868) Chase (U. S.) 167, 14 Fed. Cas. No. 7,722; *Scruggs v. Huntsville*, (1871) 45 Ala. 222;

Moseley v. Tuthill, (1871) 45 Ala. 621; *Ex p. Norton*, (1870) 44 Ala. 180; *Ray v. Thompson*, (1869) 43 Ala. 434; *Penn v. Tollison*, (1871) 26 Ark. 545; *Hawkins v. Filkins*, (1866) 24 Ark. 286; *Harlan v. State*, (1867) 41 Miss. 566; *Pennywit v. Foote*, (1875) 27 Ohio St. 600; *Hood v. Maxwell*, (1866) 1 W. Va. 219.

2. Acts of Confederate Congress— a. IN GENERAL.— The Confederate government could make no law. Its prescriptions imposed no obligations, political or moral, and the only justification for obedience which the citizen could make to his rightful sovereign was deadly coercion by violence or threats.

U. S. v. One Thousand Five Hundred Bales Cotton, (1872) 27 Fed. Cas. No. 15,958. See also *Dewing v. Perdicaries*, (1877) 96 U. S. 195.

Purchasers of property confiscated under proceedings of Confederate court acquired no title. *Central R., etc., Co. v. Ward*, (1868) 37 Ga. 515.

b. ESTABLISHING CONFEDERATE COURT.— An Act of the Confederate Congress establishing a court known as the "District Court of the Confederate States of America for the northern district of Alabama" was void. The court was a nullity, and could exercise no rightful jurisdiction. The forms of law with which it clothed its proceedings gave no protection to those who, assuming to be its officers, were the instruments by which it acted.

Hickman v. Jones, (1869) 9 Wall. (U. S.) 201.

c. APPROPRIATING BALANCES IN HANDS OF UNITED STATES POSTMASTERS.— An Act of the Confederate Congress appropriating balances in the hands of postmasters to the payment of claims against the United States for postal service, where the parties resided within the limits of the states in rebellion, could have no legal effect in making a payment to a mail carrier valid, when such payments could only be made upon the production of proper orders and receipts from the post-office department of the United States.

U. S. v. Keebler, (1869) 9 Wall. (U. S.) 86.

The surrender by a postmaster of the property of the post-office department of the United States to the Confederate government

on receiving an order through the mails from the post-office department of the Confederate states did not relieve the liability of the postmaster on his bond. *U. S. v. Morrison*, (1869) Chase (U. S.) 521, 26 Fed. Cas. No. 15,817.

3. Acts of State Governments During Insurrection— a. IN AID OF INSURRECTION.— Laws made to promote and aid the rebellion can never be recognized by, or receive the sanction of, the courts of the United States as valid and binding laws.

Thomas v. Richmond, (1870) 12 Wall. (U. S.) 357. See also the following cases:

United States. — *Taylor v. Thomas*, (1874) 22 Wall. (U. S.) 490; *Huntington v. Texas*, (1872) 16 Wall. (U. S.) 411; *Perdicaris v. Charleston Gaslight Co.*, (1869) Chase (U. S.) 435, 19 Fed. Cas. No. 10,974; *Keppel v. Petersburg R. Co.*, (1868) Chase (U. S.) 167, 14 Fed. Cas. No. 7,722; *Hatch v. Burroughs*, (1870) 1 Woods (U. S.) 439, 11 Fed. Cas. No. 6,203; *Evans v. Richmond*, (1869) Chase (U. S.) 551, 8 Fed. Cas. No. 4,570.

Mississippi. — *Mississippi Cent. R. Co. v. State*, (1871) 46 Miss. 157; *Buchanan v. Smith*, (1870) 43 Miss. 91.

North Carolina. — *Rand v. State*, (1871) 65 N. Car. 194.

Texas. — *Sequestration Cases*, (1868) 30 Tex. 689.

Virginia. — *Isaacs v. Richmond*, (1893) 90 Va. 30.

Discriminating against nonresidents. — On April 18, 1861, a convention of the state of Virginia passed an ordinance of secession, and on the 30th of that month a law entitled "An ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases," declaring that thereafter no execution (except in favor of the commonwealth and against nonresidents) should be issued, and that no sales should be made under deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law. The saving in the statute as to executions in favor of the commonwealth and against nonresidents obviously contemplated the confiscation of the property of the latter as a war measure, and was invalid. *Daniels v. Tearney*, (1880) 102 U. S. 419.

Acts of Congress defining piracies and offenses committed on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, "being enacted pursuant to the Constitution, are of paramount authority and cannot be invalidated or impaired by the action of any state or states; and every law, ordinance, and constitution made by them for that purpose, whatever its name or form, is wholly nugatory, and can afford no legal protection to those who may act under it. But suppose that a number of states undertake by revo-

lution to throw off the government of the United States and erect themselves into an independent nation, and assume in that character to issue commissions authorizing the capture of vessels of the United States, will such commissions afford any protection to those acting under them against any penal laws of the United States? Cases have heretofore arisen where a portion of a foreign empire—a colony—has undertaken to throw off the dominion of the mother country, and assumed the attitude and claimed the rights of an independent nation; and in such cases it has been held that the relation which the United States should hold to those who thus attempt and claim to institute a new government is a political rather than a legal question; that, if those departments of our government which have a right to give the law, and which regulate our foreign intercourse and determine the relation in which we shall stand to other nations, recognize such new and self-constituted government as having the rights of a belligerent in a war between them and their former rulers, and the United States hold a neutral position in such war, then the judiciary, following the other departments, will to the same extent recognize the new nation. But if the legislative and executive departments of the government utterly refuse to recognize such new government, or to acknowledge it as having any belligerent or national rights, and instead of taking a neutral attitude, endeavor by force to suppress depredations on commerce by such assumed government, as violating the rights and infringing the laws of the United States, then the judiciary will hold that such depredations are not to be considered as belligerent, and entitled to the immunities of lawful war, but as robbery or other lawless depredations, subject to the penalties denounced by our laws against such offenses." Charge of Grand Jury, (1861) 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

Where the judgments of the courts gave effect to the legislation of the revolutionary legislatures, which was enacted for the purpose of aiding the rebellion, or deprived citizens of the United States of their just rights, such judgments and decrees were void, and no subsequent legislation could make them good. *Van Epps v. Walsh*, (1870) 1 Woods (U. S.) 598, 28 Fed. Cas. No. 16,850.

b. NOT IN AID OF INSURRECTION. — The acts of the several states in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates

settled, and the transfer and descent of property regulated precisely as in time of peace.

Horn v. Lockhart, (1873) 17 Wall. (U. S.) 580. See also *U. S. v. Home Ins. Co.*, (1874) 22 Wall. (U. S.) 103; *Sprott v. U. S.*, (1874) 20 Wall. (U. S.) 459; *Thomas v. Richmond*, (1870) 12 Wall. (U. S.) 357; *Evans v. Richmond*, (1869) Chase (U. S.) 551, 8 Fed. Cas. No. 4,570; *Cook v. Oliver*, (1870) 1 Woods (U. S.) 437, 6 Fed. Cas. No. 3,164; *Keppel v. Petersburg R. Co.*, (1868) Chase (U. S.) 167, 14 Fed. Cas. No. 7,722; *Chappell v. Doe*, 49 Ala. 155; *Calhoun v. Kellogg*, (1870) 41 Ga. 240; *Buchanan v. Smith*, (1870) 43 Miss. 90; *Hill v. Boylan*, (1866) 40 Miss. 618; *Morgan v. Keenan*, (1869) 1 S. Car. 327; *Frierson v. Presbyterian Church*, (1872) 7 Heisk. (Tenn.) 705; *Wallace v. State*, (1870) 33 Tex. 445; *Prince William School Board v. Stuart*, (1885) 80 Va. 81.

"It is not necessary to attempt any exact definitions within which the Acts of such a state government must be treated as valid or invalid. It may be said, perhaps with sufficient accuracy, that Acts necessary to peace and good order among citizens, such, for example, as Acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to

person and estate, and other similar Acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that Acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other Acts of like nature, must, in general, be regarded as invalid and void." *Texas v. White*, (1868) 7 Wall. (U. S.) 733.

"When the action of the courts of the rebellious states were simply directed to the settlement of the rights of private persons, when they did not tend to defeat the just rights of citizens of the United States; when they were not in the furtherance of laws passed to sustain or uphold the rebellion; when they were not used for the purpose of oppressing those who adhered to the United States; in short, when the decision of the court could not from the nature of the case be influenced by the existing rebellion, in such case the action and judgment of the court is binding on the parties actually within the jurisdiction of the court." *Cook v. Oliver*, (1870) 1 Woods (U. S.) 437, 6 Fed. Cas. No. 3,164. See also *Parks v. Coffey*, (1875) 52 Ala. 42.

4. Contract Made in Aid of Rebellion.—A contract made in aid of the rebellion is void, and cannot be enforced in the courts.

Texas v. White, (1868) 7 Wall. (U. S.) 700; *Hanauer v. Doane*, (1870) 12 Wall. (U. S.) 342; *Thorington v. Smith*, (1868) 8 Wall. (U. S.) 7; *Bibb v. County Com'rs Ct.*,

(1870) 44 Ala. 119; *Chancely v. Bailey*, (1868) 37 Ga. 532; *Leak v. Richmond County*, (1870) 64 N. Car. 132; *Whitis v. Polk*, (1872) 36 Tex. 602.

5. Contract for Payment of Confederate Notes.—A contract for the payment of Confederate notes made during the rebellion, between parties residing within the so-called Confederate states, could be enforced in the courts of the United States.

Thorington v. Smith, (1868) 8 Wall. (U. S.) 6, wherein the court said: "While the war lasted, however, they [Confederate notes] had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force. It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded for that reason only as made in aid of the foreign invasion in the one case, or of the domestic insurrection

in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation." See also *Mathews v. Rucker*, (1874) 41 Tex. 636 [*overruling* *Vance v. Burtis*, (1873) 39 Tex. 88; *Dittmar v. Myers*, (1873) 39 Tex. 295; *Sutton v. Sutton*, (1873) 39 Tex. 549; *Kyle v. House*, (1873) 38 Tex. 155; *Lane v. Thomas*, (1873) 37 Tex. 157; *Grant v. Ryan*, (1873) 37 Tex. 37; *Lacey v. Clements*, (1872) 36 Tex. 661; *McGar v. Nixon*, (1872) 36 Tex. 289; *Scott v. Atchison*, (1872) 36 Tex. 70; *Shepard v.*

Taylor, (1872) 35 Tex. 774]. But see *Thornburg v. Harris*, (1866) 3 Coldw. (Tenn.) 157; *Bailey v. Milner*, (1868) 1 Abb. (U. S.) 261, 2 Fed. Cas. No. 740; *McCracken v. Poole*, (1867) 19 La. Ann. 359.

"Transactions between individuals, which would be legal and binding under ordinary circumstances, cannot be pronounced illegal and of no obligation because done in conformity with laws enacted or directions given by the usurping power. Between these extremes of lawful and unlawful there is a large variety

of transactions to which it is difficult to apply strictly any general rule; but it may be safely said that transactions of the usurping authority, prejudicial to the interests of citizens of other states excluded by the insurrection and by the policy of the national government from the care and oversight of their own interests within the states in rebellion, cannot be upheld in the courts of that government." *Keppel v. Petersburg R. Co.*, (1868) Chase (U. S.) 167, 14 Fed. Cas. No. 7,722. See also *Thomas v. Taylor*, (1869) 42 Miss. 651.

ARTICLE VI.

"The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

Provisions Mandatory.— The provision declaring that the members of the several state legislatures shall be bound by oath or affirmation to support the Constitution must be complied with.

Thomas v. Taylor, (1869) 42 Miss. 700, *overruling Hill v. Boyland*, (1866) 40 Miss. 640, holding that the provision was intended to be merely directory. See also *White v. McKee*, (1867) 19 La. Ann. 111.

"The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is

proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several states for their consideration and decision." *Ableman v. Booth*, (1858) 21 How. (U. S.) 524.

Cannot Change but May Add to Oath.— The oath which may be exacted — that of fidelity to the Constitution — is prescribed, and no other can be required. Yet the legislature may superadd, to the oath directed by the Constitution, such other oath of office as its wisdom may suggest.

McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 416.

ARTICLE VII.

“The ratification of the conventions of nine states, shall be sufficient for the establishment of this Constitution between the states so ratifying the same.”

That the Constitution Went into Effect on March 4, 1789, see *When the Constitution Went into Effect*, 8 FED. STAT. ANNOT. 273.

Dates of Ratification by the Several States. — On March 4, 1789, the day which had been fixed for commencing the operations of government under the new Constitution, it had been ratified by the conventions chosen in each state to consider it, as follows:

Delaware. — December 7, 1787.

Pennsylvania. — December 12, 1787.

New Jersey. — December 18, 1787.

Georgia. — January 2, 1788.

Connecticut. — January 9, 1788.

Massachusetts. — February 6, 1788.

Maryland. — April 28, 1788.

South Carolina. — May 23, 1788.

New Hampshire. — June 21, 1788.

Virginia. — June 26, 1788.

New York. — July 26, 1788.

North Carolina. — The President informed Congress on the 28th of January, 1790, that North Carolina had ratified the Constitution November 21, 1789.

Rhode Island. — The President informed Congress on the 1st of June, 1790, that Rhode Island had ratified the Constitution May 29, 1790.

Vermont, in convention, ratified the Constitution January 10, 1789, and was, by an Act of Congress approved February 19, 1791, “received and admitted into this Union as a new and entire member of the United States.”

AMENDMENT I.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹

Not a Limitation on the States. — The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. Nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.

Permoli v. Municipality No. 1, (1845) 3 How. (U. S.) 609.

That this amendment is not a limitation on the powers of the state, see also the following cases:

United States. — *Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Fox v. Ohio*, (1847) 5

How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *U. S. v. Rhodes*, (1806) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282.

Connecticut. — *Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct. Hartford County, Sept. T. 1816.

Illinois. — *Keith v. Henkleman*, (1898) 173 Ill. 143.

New York. — *Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100.

Rhode Island. — *State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60.

Incorporation, and Appropriation for Hospital, of Religious Society. — An Act of Congress chartering a corporation for the purpose of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as

¹ The first ten amendments were submitted to the several states by a joint resolution of Congress, adopted on September 25, 1789, under a preamble reciting: “The conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the government will best insure the beneficent ends of its institution.” 1 U. S. Stat. at L. 97. They were ratified by the following states, and the notifications of ratification by the governors thereof were successively communicated by the President to Congress: *New Jersey*, November 20, 1789; *Maryland*, December 19, 1789; *North Carolina*, December 22, 1789; *South Carolina*, January 19, 1790; *New Hampshire*, January 25, 1790; *Delaware*, January 28, 1790; *Pennsylvania*, March 10, 1790; *New York*, March 27, 1790; *Rhode Island*, June 15, 1790; *Vermont*, November 3, 1791, and *Virginia*, December 15, 1791. There is no evidence on the journals of Congress that the legislatures of Connecticut, Georgia, and Massachusetts ratified them.

There were twelve articles proposed, the first two of which failed of adoption. The two rejected read as follows: “Art. I. After the first enumeration required by the first article of the Constitution, there shall be one representation for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives, nor less than one representative for every forty thousand persons, until the number of representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred representatives, nor more than one representative for every fifty thousand persons. Art. II. No law varying the compensation for the services of the senators and representatives shall take effect, until an election of representatives shall have intervened.”

may place themselves under the treatment and care of the corporation, and an appropriation by Congress for the purpose of aiding such hospital in carrying out the provisions of an agreement entered into between the commissioners of the district and the directors of the hospital, do not conflict with this provision from the mere fact that the members of the corporation are members of a monastic order or sisterhood of the church.

Bradfield v. Roberts, (1899) 175 U. S. 295, *affirming* (1896) 12 App. Cas. (D. C.) 455.

Ecclesiastical Government Not Subject to Judicial Review.—In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson v. Jones, (1871) 13 Wall. (U. S.) 729.

Polygamy is not under the protection of the constitutional guaranty of religious freedom.

Church of Jesus Christ v. U. S., (1890) 136 U. S. 49.

One indicted for polygamy cannot set up this amendment as a defense. *Reynolds v. U. S.*, (1878) 98 U. S. 163, in which case the court said that the word "religion" is not defined in the Constitution. In giving the history of the adoption of this amendment, the court, as an aid to its interpretation, referred to the Act of Virginia "establishing religious freedom" in which religious freedom is defined, and after a recital "that to

suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

A Territorial Statute which "provides that no person is entitled to register or vote at any election who is 'a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or any other person to commit the crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy or polygamy or

plural or celestial marriage as a doctrinal rite of such organization,' " is not a law respecting an establishment of religion, in violation of this amendment.

Davis v. Beason, (1890) 133 U. S. 342, wherein the court said: "The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes

of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."

AMENDMENT I.

"Congress shall make no law * * * abridging the freedom of speech, or of the press."

That This Amendment Is Not a Limitation on the States, see *supra*, p. 241.

Not Intended for Protection of Aliens. — The rights guaranteed by these provisions belong only to persons who are citizens of the United States, and cannot be asserted in favor of persons who seek to gain admission to this country but are excluded by the statute regulating the admission of aliens and excluding anarchists.

U. S. v. Williams, (1904) 194 U. S. 292.

"The President Has the Same Freedom of Speech which the Constitution guarantees to every American citizen."

Trial of Andrew Johnson, 178.

Publication of Libels or Indecent Articles. — The freedom of speech and of the press does not permit the publication of libels, blasphemous or other indecent articles, or other publications injurious to morals or private reputation.

Robertson v. Baldwin, (1897) 165 U. S. 281, wherein the court said: "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed." See also *Arnold v. Clifford*, (1835) 2 Sumn. (U. S.) 238, 1 Fed. Cas. No. 555.

Prohibiting Mailing Obscene Paper. — An Act of Congress making it an offense to mail an obscene paper does not contravene this amendment.

Harman v. U. S., (1892) 50 Fed. Rep. 921, *affirming* *U. S. v. Harmon*, (1891) 45 Fed. Rep. 414.

Prohibiting Mailing Newspaper Containing Advertisement of Lottery. — A statute under which an indictment is framed, charging the offense of mailing a newspaper containing an advertisement of a state lottery, is not obnoxious to this provision which forbids Congress passing any law abridging the freedom of the press; "the circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people."

In re Rapier, (1892) 143 U. S. 132. See also *Horner v. U. S.*, (1892) 143 U. S. 213; *Horner v. U. S.* (1892) 143 U. S. 570.

Prohibiting Soliciting Political Contributions. — An Act of Congress providing "that no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this Act,

or in any navy yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever," is not invalid when construed as prohibiting any person from soliciting aid from any other person, whether an officer or employee of the government or not, under the circumstances and in the places mentioned in the statute.

U. S. v. Newton, (1891) 20 D. C. 227.

AMENDMENT I.

"Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Not a Limitation on the States.— This amendment, like the others proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the national government alone. They left the authority of the states just where they found it and added nothing to the already existing powers of the United States.

U. S. v. Cruikshank, (1875) 92 U. S. 552, wherein the court said: "This amendment assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, there-

fore, the people must look to the states. The power for that purpose was originally placed there, and it has never been surrendered to the United States. *Affirming* (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

That this amendment is not a limitation on the states, see also *supra*, p. 241.

AMENDMENT II.

“A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.”

Not a Limitation on the States. — This amendment is a limitation only upon the power of Congress and the national government, and not upon that of the states, and cannot be made to apply to a state statute which forbids bodies of men to associate together as military organizations or to drill or parade with arms in cities and towns unless authorized by law.

Presser v. Illinois, (1886) 116 U. S. 252.

That this amendment is not a limitation on the powers of the state, see the following cases:

United States. — *Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolin v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1899) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *Arkansas v. Kansas*, etc., *Coal Co.*, (1899) 96 Fed. Rep. 353, reversed and remanded with direction to remand to the state court on the ground of improper removal therefrom, (1901) 183 U. S. 185; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 280, 26 Fed. Cas. No. 15,282.

Arkansas. — *Fife v. State*, (1876) 31 Ark. 455.

Connecticut. — *Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct. Hartford County, Sept. T. 1816.

Illinois. — *Keith v. Henkleman*, (1898) 173 Ill. 143.

This Clause Declares a General Right, leaving it for other more specific constitutional provision or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights.

Opinion of Justices, (1859) 14 Gray (Mass.) 620.

The Word “Arms,” in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols, and carbine;

Missouri. — *State v. Wilforth*, (1881) 74 Mo. 528; *State v. Shelby*, (1886) 90 Mo. 304.

New York. — *Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 100.

North Carolina. — *State v. Newsom*, (1844) 5 Ired. L. (27 N. Car.) 250.

Rhode Island. — *State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60.

Tennessee. — *Andrews v. State*, (1871) 3 Heisk. (Tenn.) 165.

The right of “bearing arms for a lawful purpose” is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. This amendment declares that it shall not be infringed; but this means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to the powers which relate to merely municipal legislation not surrendered or restrained by the Constitution of the United States. *U. S. v. Cruikshank*, (1875) 92 U. S. 553, *affirming* (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

of the artillery, the field piece, siege gun, and mortar, with side arms. The terms dirks, daggers, slungshots, sword canes, brass knuckles, and bowie knives belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.

English v. State, (1872) 35 Tex. 476.

The keeping and bearing of arms, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons

of warfare to be used by the militia, such as swords, guns, rifles, and muskets — arms to be used in defending the state and civil liberty — and not to pistols, bowie knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state. *State v. Workman*, (1891) 35 W. Va. 372.

Prohibiting Carrying Concealed Weapons. — The right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons.

Robertson v. Baldwin, (1897) 165 U. S. 281.

A state statute prohibiting the carrying of concealed weapons does not infringe the right of the people to bear arms. It is a measure of police, prohibiting only a particular mode of bearing arms which is found dangerous to

the peace of society. *State v. Jumel*, (1858) 13 La. Ann. 399; *State v. Buzzard*, 4 Ark. 18; *Nunn v. State*, (1846) 1 Ga. 243. See also *State v. Chandler*, (1850) 5 La. Ann. 489; *English v. State*, (1872) 35 Tex. 475; *Cockrum v. State*, (1859) 24 Tex. 394, as to carrying bowie knife or dagger.

AMENDMENT III.

"No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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IX. TAKING AWAY RIGHT OF ACTION FOR VIOLATION OF RIGHTS, 255.

I. NOT A LIMITATION ON THE STATES. — This amendment has no application to state process.

Smith v. Maryland, (1855) 18 How. (U. S.) 71.

That this amendment is not a limitation on the powers of the states, see also the following cases:

United States. — *Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606,

affirming (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *Kansas v. Bradley*, (1885) 26 Fed. Rep. 289; U. S. v.

Rhodes, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; U. S. v. Hall, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282; U. S. v. Crosby, (1871) 1 Hughes (U. S.) 448, 25 Fed. Cas. No. 14,893.

Connecticut. — Colt v. Eves, (1827) 12 Conn. 251; State v. Phelps, Super. Ct. Hartford County, Sept. T. 1816.

Illinois. — Keith v. Henkleman, (1898) 173 Ill. 143.

Kentucky. — Reed v. Rice, (1829) 2 J. J. Marsh. (Ky.) 45.

Louisiana. — Guillotte v. New Orleans, (1857) 12 La. Ann. 434.

New York. — Murphy v. People, (1824) 2 Cow. (N. Y.) 815; Jackson v. Wood, (1824) 2 Cow. (N. Y.) 819, note; Livingston v. New York, (1831) 8 Wend. (N. Y.) 85, 100.

Rhode Island. — State v. Paul, (1858) 5 R. I. 185, 196; State v. Keeran, (1858) 5 R. I. 497; In re Fitzpatrick, (1886) 16 R. I. 68.

South Carolina. — State v. Atkinson, (1893) 40 S. Car. 370.

South Dakota. — State v. Brennan, (1891) 2 S. Dak. 388.

II. AFFIRMATION OF COMMON-LAW PRINCIPLES. — With the adoption of this amendment principles established at the common law became reaffirmed in the Constitution.

U. S. v. Three Tons Coal, (1875) 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515.

III. APPLICABLE TO CRIMINAL CASES ONLY. — A distress warrant issued by the solicitor of the treasury under an Act of Congress is not forbidden by this article because issued without the support of an oath or affirmation. This article has no reference to civil proceedings for the recovery of debts of which a search warrant is not made part. The process in this case is termed in the Act of Congress a warrant of distress. The name bestowed upon it cannot affect its constitutional validity.

Murray v. Hoboken Land, etc., Co., (1855) 18 How. (U. S.) 274. See also Matter of Meador, (1869) 1 Abb. (U. S.) 317, 16 Fed. Cas. No. 9,375.

There is an intimate relation between the Fourth and Fifth Amendments. "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreason-

able search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." Boyd v. U. S., (1886) 116 U. S. 633, reversing U. S. v. Boyd, (1885) 24 Fed. Rep. 690, 692. See also Blum v. State, (1902) 94 Md. 382.

This amendment, like the clause in the Fifth Amendment, that no person "shall be compelled in any criminal case to be a witness against himself," is applicable to criminal cases only. In re Strouse, (1871) 1 Sawy. (U. S.) 605, 23 Fed. Cas. No. 13,548.

IV. LIMITATION ON TERRITORIES. — This clause stands as a limitation of the power of the territorial legislature.

Peacock v. Pratt, (C. C. A. 1903) 121 Fed. Rep. 778.

This amendment is not only a limitation upon the power of the United States courts, but is operative in the territories, and is a

limitation upon their legislation and courts. To hold this amendment a restriction upon Congress and yet not a restriction upon a government created by Congress, would be a contradiction of terms. Territory v. Cutinola, (1887) 4 N. Mex. 160.

V. PROTECTION OF RESIDENT ALIENS. — Aliens while in the United States are entitled to the benefits of constitutional guaranties, which are not confined to citizens, as affecting liberties and property. Opening envelopes of Chinese persons and taking letters from them, for use in deportation proceedings, is a seizure of papers that is unreasonable, and contrary to the spirit of this amendment.

U. S. v. Wong Quong Wong, (1899) 94 Fed. Rep. 832.

VI. "UNREASONABLE SEARCHES AND SEIZURES" — 1. Reasonableness of Search a Judicial Question. — The question whether a seizure or a search is unreasonable in the language of the Constitution is a judicial and not a legislative question; but in determining whether a seizure is or is not unreasonable, all of the circumstances under which it is made must be looked to.

Mason v. Rollins, (1869) 2 Biss. (U. S.) 99, 16 Fed. Cas. No. 9,252.

2. Search Warrant Against an Individual. — There is no prohibition against the issuance of a search warrant of the person of an individual in a proper case.

Collins v. Lean, (1885) 68 Cal. 288.

3. Opening Letters and Papers in the Mail. — Whilst in the mail, papers can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution.

Ex p. Jackson, (1877) 96 U. S. 733. See also *Commerford v. Thompson*, (1880) 1 Fed. Rep. 417.

Letters and papers seized by local postmaster. — When, under an order of the postmaster-general, sealed letters and packages

are seized by a local postmaster, without warrant, and marked "Fraudulent," and returned to the dead-letter office, to be there disposed of as other dead matter under the laws and regulations, this clause of the Constitution has been violated. *Hoover v. McChesney*, (1897) 81 Fed. Rep. 472.

4. Compulsory Production of Books and Papers. — Suits for penalties and forfeitures incurred by the commission of offenses against the law are of a quasi-criminal nature, and are within the reason of criminal proceedings for all the purposes of the Fourth Amendment, and of that provision of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself within the meaning of the Fifth Amendment, and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment.

Boyd v. U. S., (1886) 116 U. S. 634, wherein the court said that the compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property, is within the scope of this amendment in all cases in which search and seizure would be. "It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former Acts; but it accomplishes the substantial object of those Acts in forcing from a party evidence against himself." *Reversing U. S. v. Boyd*, (1885)

24 Fed. Rep. 690, 692. See also *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 241.

The fifth section of the Act of June 22, 1874, providing for the production of books and papers, etc., "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States," is not a violation of this clause. No one can engage in the manufacture and sale of spirits without the consent of the government. That consent is obtained on certain terms and conditions. No one can be allowed to say that, as a distiller, he has kept a private record of his transactions. His books and entries are

quasi-public books and entries. The government has a right to see any record kept by him of his business. *U. S. v. Distillery No. Twenty-Eight*, (1875) 6 Biss. (U. S.) 483, 25 Fed. Cas. No. 14,966.

An Act of Congress authorizing compulsory process for the production of the books and papers of a claimant or defendant in any proceeding other than criminal, arising under the laws relating to revenue, is not obnoxious to this clause. *U. S. v. Three Tons Coal*, (1875) 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515.

The Act of March 2, 1867, section 2, providing that "whenever it shall be made to appear to the satisfaction of the judge of the District Court for any district in the United States, by complaint and affidavit, that any fraud on the revenue has been committed by any person or persons interested, or in any way engaged, in the importation or entry of merchandise at any port within such district, said judge shall forthwith issue his warrant directed to the marshal of the district, requiring said marshal, by himself or deputy, to enter any place or premises where any invoices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers and produce them before the said judge; and any invoices, books, or papers so seized shall be subject to the order of said judge, who shall allow the examination of the same by the collector of customs of the port into which the alleged fraudulent importation shall have been made, or by any officer duly authorized by said collector," was held not to be in conflict with this clause. Such searches and seizures might be summary and severe, but they were in the exercise of the power of Congress to collect duties on imports, and cannot be said not to have been necessary and proper to that end. *Matter of Platt*, (1874) 7 Ben. (U. S.) 261, 19 Fed. Cas. No. 11,212.

An Act of Congress authorizing a district judge, upon complaint that a fraud upon the revenue has been committed, to issue a search warrant, directed to the marshal, requiring him to enter, in the daytime, the premises of designated parties and there search for such books and papers as are therein described, to be brought before the district judge, and placed in the custody of the district attorney for his official examination, is constitutional. *Stockwell v. U. S.*, (1870) 3 Cliff. (U. S.) 284, 23 Fed. Cas. No. 13,466, *affirmed* upon the merits and the construction of the statutes, (1871) 13 Wall. (U. S.) 531. See also *Kimball v. Weld*, (1871) 14 Int. Rev. Rec. 180, 14 Fed. Cas. No. 7,776.

A proceeding under a revenue Act to compel a person to produce his books for examination by an assessor is a civil and not a criminal proceeding and does not infringe this amendment. *In re Strouse*, (1871) 1 Sawy. (U. S.) 605, 23 Fed. Cas. No. 13,548.

Officer's search limited to question of identity. — Upon a search warrant, under an Act of Congress authorizing its issue upon complaint that a fraud upon the revenue has been committed, neither the marshal nor any one acting under him can inspect books for any other purpose than to determine their identity with those described in the warrants. *Kimball v. Weld*, (1871) 14 Int. Rev. Rec. 180, 14 Fed. Cas. No. 7,776.

Inspection of bank books and papers. — An Act of Congress authorizing a supervisor of internal revenue to compel banks to permit an inspection of their books and papers connected with a public business, in which the United States has an interest in the collection of the revenue, is constitutional. *Stanwood v. Green*, (1870) 2 Abb. (U. S.) 184, 22 Fed. Cas. No. 13,301.

Private papers deposited in bank vault. — The president of an insolvent bank brought a bill against the receiver to obtain possession of a trunk alleged to contain private papers. The bill alleged that the plaintiff deposited in the vaults of the bank certain private and personal books, papers, and other documents, which were never the property of the bank, and that some of the papers were then in a trunk, to which he held the key; that the trunk was in the vault when the bank was closed by order of the comptroller, and that the receiver had since held it, and refused to pass it to the plaintiff; that the papers were personal in their nature, and necessary to a settlement of his business affairs; that he was charged with violations of the law, and that the government attorney was about to issue a summons calling the defendant before the grand jury with the papers in question; that he was without adequate remedy at law, and therefore sought the interposition of a court of equity. The evidence of the cashier tended to show that the trunk in question was kept in the bank and not elsewhere, as the private trunk of the plaintiff, but witness had no knowledge of the contents. As the plaintiff asked for affirmative relief, and from the character of the possession it was considered that the court should know, in a general way, what the trunk contained, and an order was made appointing a master, and, after examination by the master of the contents of the trunk in the presence of no one, such papers as were the property of the bank, and not material to the issue suggested by the district attorney, should be delivered to the receiver; such as were private, and were not the property of the bank, together with such as were material to be introduced by the plaintiff on his own behalf, should be delivered to the plaintiff; and such as, in the judgment of the master, were or might be material to the issue suggested by the district attorney, were to be sealed and held for further orders. *Potter v. Beal*, (1892) 49 Fed. Rep. 793.

If a Litigant Has No Right in or to the Papers in the Hands of the Third Person, nor any legal interest in them, it might possibly violate the Fourth Amendment of the

Constitution to force the latter to produce them by an unwarrantable seizure, actual or constructive.

In re Comingore, (1899) 96 Fed. Rep. 552, affirmed (1900) 177 U. S. 470, as to the authority of the secretary of the treasury, under the regulations as to the custody, use and preservation of the records, papers, and property appertaining to the business of his de-

partment, to take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.

5. Compelling Interstate Corporations to Produce Contracts.—Compelling railroad companies to produce contracts with coal companies, to be used as evidence before the interstate commerce commission, which would tend to show a discrimination against coal companies not having such contracts and paying the full rate, does not constitute a violation of the right to be secure against unreasonable searches and seizures.

Interstate Commerce Commission v. Baird, (1904) 194 U. S. 44.

6. Seizure and Forfeiture of Vessels.—Congress has the power not only to seize and forfeit, if necessary, vessels, and to punish the persons controlling and navigating them, for breaches of regulations, but also to impose upon them such restraints as are necessary to prevent them from violating its laws. Such a power has been always deemed essential to the protection of the customs and the full execution of the revenue laws.

Baker v. Wise, (1861) 16 Gratt. (Va.) 139.

7. Requiring Witness to Testify Before Senate as to Business Transaction.—A party is not subjected to an unreasonable search by reason of being required, in an investigation conducted by the Senate, to appear as a witness and answer the question whether the firm of which the witness was a member had bought or sold certain stocks during a certain month for or in the interest, directly or indirectly, of any United States senator.

In re Chapman, (1897) 166 U. S. 669. See *Chapman v. U. S.*, (1896) 8 App. Cas. (D. C.) 302; *Chapman v. U. S.*, (1895) 5 App. Cas. (D. C.) 122.

8. Use of Papers Illegally Obtained as Evidence.—The admission of testimony illegally obtained does not constitute a violation of the constitutional guaranty of privilege from unlawful search or seizure.

Adams v. New York, (1904) 192 U. S. 597, wherein the court said: "The security intended to be guaranteed by the fourth amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent." *Affirming People v. Adams*, (1903) 176 N. Y. 351.

If an individual by an illegal search or seizure obtains possession of an article or document, the state may nevertheless make use of the same as evidence against the person from whom they were wrongfully obtained to convict him of a crime; and the inhibition found in article 4 of the amendments to the Federal Constitution, and in many state constitutions, against unreasonable searches and seizures is a limitation upon the power of the state to make such searches and seizures for its own benefit and has no reference to unauthorized acts of individuals. *Bacon v. U. S.*, (C. C. A. 1899) 97 Fed. Rep. 40.

VII. ARREST IS EXCLUSIVELY A JUDICIAL PROCEEDING. — Arrest for trial is a proceeding belonging to the judiciary, not to the executive, branch of the government, and the warrant of arrest must be founded on an information on oath. The President has no power to cause an arrest to be made except upon probable cause, supported by oath or affirmation.

Power to Cause An Arrest, (1818) 1 Op. Atty.-Gen. 229. See also *In re Metzger*, (1847) 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

An arrest and detention under an order of

the war department, entitled "Persons discouraging enlistments to be arrested," was held to be in direct violation of this clause. *Ex p. Field*, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761.

VIII. "UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION" —

1. Necessity of Showing Probable Cause. — A warrant of commitment by justices of the peace must state a good cause certain, supported by oath.

Ex p. Burford, (1806) 3 Cranch (U. S.) 448. See also *In re Gourdin*, (1891) 45 Fed. Rep. 842; Proof Necessary to An Arrest, (1829) 2 Op. Atty.-Gen. 266.

An arrest by virtue of a warrant issued by a commissioner of the United States upon a complaint duly made to him under oath showing probable cause, gives no ground to claim that the guarantees of personal liberty secured by this amendment have been violated. *U. S. v. Maxwell*, (1875) 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750.

The protection guaranteed is not against all seizures; it is against unreasonable seizures.

It can be made only upon probable cause, and when authorized the evidence of its reasonableness is to be furnished by oath or affirmation. Extradition Under Treaty of Washington, (1843) 4 Op. Atty.-Gen. 213.

"Unlawfully." — A warrant charging that the person named had "unlawfully" used a "certificate of citizenship of the Superior Court in the city of New York, showing him to be admitted to be a citizen," for the purpose of registering himself as a voter, knowing that such certificate was "unlawfully issued or made," does not set forth probable cause. *Matter of Coleman*, (1879) 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980.

Being a Suspicious Person. — An Act of Congress, legislating for the District of Columbia, providing "that all vagrants, all idle and disorderly persons, persons of evil life or evil fame, persons who have no visible means of support, persons repeatedly drunk in or about any of the streets, alleys, roads, highways, or other public places within the District of Columbia, persons repeatedly loitering in or around tippling houses, all suspicious persons, all public prostitutes, and all persons who lead a lewd or lascivious life, shall, upon conviction thereof, be fined not to exceed forty dollars, or shall be required to enter into security for their good behavior for a period of six months," is nugatory and without effect as to the provision declaring that "all suspicious persons" could be arrested and prosecuted as criminals. A suspicious character does not constitute crime, nor does it justify the government in treating the party having such reputation as a criminal, without connecting him with some criminal act or conduct.

Stoutenburgh v. Frazier, (1900) 16 App. Cas. (D. C.) 233.

2. Affidavit Must Be Made upon Knowledge of Affiant. — An affidavit "as he verily believes," does not furnish such a probable cause and is not supported by such an oath as is required by this amendment. The "probable cause supported by oath or affirmation," prescribed by the fundamental law, is the oath or affidavit of those persons who, of their own knowledge, depose to the facts which constitute the offense. Section 1014 of the Revised Statutes authorizes

the usages of the state to be followed as to the process against offenders. But this, if it refers to anything more than the form of the warrant, could not include any usage which is expressly prohibited by the Constitution of the United States.

U. S. v. Tureaud, (1884) 20 Fed. Rep. 622.

Affidavit by officer upon information.—An affidavit made by an officer who, upon the relation of others whose names are not disclosed, swears that, upon information, he has reason to believe, and does believe, the person charged has committed the offense charged, does not meet the requirement of the Constitution. *Matter of Rule of Ct.*, (1877) 3 Woods (U. S.) 502, 20 Fed. Cas. No. 12,126, in which case the court said: "It is plain from this fundamental enunciation, as well as from the books of authority on criminal matters in the common law, that the probable cause referred to, and which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that he, the magistrate, may exercise his own judgment on the sufficiency of the ground shown for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the party's guilt. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based and on which the belief or suspicion of guilt is founded."

When a motion is made to quash an indictment upon the ground that the information upon which the government seeks to hold the defendant to answer and trial was filed by the district attorney without oath or proof of probable cause, and without application to or leave of the court, if it appears that the application for the warrant had been supported on oath or affirmation, the court could not inquire whether the showing was sufficient to justify the issuance of the warrant, but when it is alleged that there was no showing supported by oath or affirmation, and the illegality of the warrant is made the basis for arresting the further proceedings in the cause, it is the duty of the court to inquire whether the fact is as asserted. If it appears that the proceedings anterior to the issuance of the warrant lay no foundation for the arrest, all proceedings based upon such unlawful arrest must fail. *U. S. v. Shepard*, (1870) 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273.

An information filed by a district attorney, *ex officio*, will authorize the issuance of a warrant both at common law and under the Constitution. An information filed by a district attorney and supported by an affidavit made by himself, stating the facts to be true according to his information and belief, is sufficient. *Territory v. Cutinola*, (1887) 4 N. Mex. 160.

IX. TAKING AWAY RIGHT OF ACTION FOR VIOLATION OF RIGHTS.—Section 4 of the Act of Congress of March 3, 1863, providing "that any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue," violates the provision securing the people against unreasonable searches and seizures.

Griffin v. Wilcox, (1863) 21 Ind. 372.

AMENDMENT V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

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I. NOT A LIMITATION ON THE STATES. — This amendment is a limitation on the power of Congress.

McFaddin v. Evans-Snider-Buel Co., (1902) 185 U. S. 509.

That this amendment is not a limitation on the powers of the states, see also the following cases:

United States. — *Ohio v. Dollison*, (1904) 194 U. S. 447; *Capital City Dairy Co. v. Ohio*, (1902) 183 U. S. 245; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Talton v. Mayes*, (1896) 163 U. S. 382; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *Thorington v. Montgomery*, (1893) 147 U. S. 492; *Hallinger v. Davis*, (1892) 146 U. S. 319; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Matter of Sawyer*, (1887) 124 U. S. 219; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Kelly v. Pittsburgh*, (1881) 104 U. S. 79; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Twitchell v. Pennsylvania*, (1868) 7 Wall. (U. S.) 324; *Withers v. Buckley*, (1857) 20 How. (U. S.) 90; *Fox v. Ohio*, (1847) 5 How.

(U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. Rep. 629; *Williams v. Hert*, (1901) 110 Fed. Rep. 168; *Clark v. Russell*, (C. C. A. 1899) 97 Fed. Rep. 902; *In re Boggs*, (1891) 45 Fed. Rep. 475; *Ex p. Ulrich*, (1890) 42 Fed. Rep. 589; *Kansas v. Bradley*, (1885) 26 Fed. Rep. 289; *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 389, *affirmed* on other grounds (1886) 118 U. S. 394; *Clark v. Dick*, (1870) 1 Dill. (U. S.) 8, 5 Fed. Cas. No. 2,818; *Griffing v. Gibb*, (1857) McAll. (U. S.) 212, 11 Fed. Cas. No. 5,819; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282; *U. S. v. Keen*, (1839) 1 McLean (U. S.) 429, 26 Fed. Cas. No. 15,510; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

Connecticut. — *Colt v. Eves*, (1837) 12 Conn. 251.

Illinois. — *Keith v. Henkleman*, (1898) 173 Ill. 143.

Indiana. — *State v. Comer*, (1902) 157 Ind. 613; *Griffin v. Wilcox*, (1863) 21 Ind. 384.

Kentucky.—*Jane v. Com.*, (1860) 3 Met. (Ky.) 18.

Louisiana.—*State v. Anderson*, (1878) 30 La. Ann. 559; *State v. Carro*, (1874) 26 La. Ann. 377; *State v. Jackson*, (1869) 21 La. Ann. 574.

New York.—*Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100.

Ohio.—*Prescott v. State*, (1869) 19 Ohio St. 187.

Rhode Island.—*State v. Paul*, (1858) 5 R. I. 185, 196; *In re Fitzpatrick*, (1888) 16 R. I. 60; *State v. Keeran*, (1858) 5 R. I. 497.

South Carolina.—*State v. Atkinson*, (1893) 40 S. Car. 370; *State v. Shirer*, (1883) 20 S. Car. 404.

Texas.—*Pitner v. State*, (1887) 23 Tex. App. 375.

Utah.—*Kimball v. Grantsville City*, (1899) 19 Utah 373.

Vermont.—*State v. Keyes*, (1836) 8 Vt. 63.

Washington.—*State v. Nordstrom*, (1893) 7 Wash. 508.

While many states, in the exercise of their undoubted sovereignty, have provided for trials of criminal offenses upon information filed by the prosecuting officer and without any previous inquiry or action by a grand jury, the National Constitution, in its solicitation for the protection of the individual, requires an indictment as a prerequisite to a trial. *Beavers v. Henkel*, (1904) 194 U. S. 84.

II. CONGRESS WITHOUT POWER TO LIMIT THE CONSTITUTIONAL RIGHT.—The purpose of the amendment was to limit the powers of the legislature as well as of the prosecuting officers of the United States, and no declaration of Congress that a crime is infamous is needed to secure, or competent to defeat, the constitutional safeguard.

Ex p. Wilson, (1885) 114 U. S. 426.

III. OFFENSES AGAINST FOREIGN GOVERNMENTS.—This clause was not designed to embrace any other than offenses against the United States. It does not include an offense against a foreign government for which extradition proceedings are pending.

Extradiction under Treaty of Washington, (1843) 4 Op. Atty-Gen. 213.

IV. APPLICATION TO ALIENS—1. In General.—Aliens cannot be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

Wong Wing v. U. S., (1896) 163 U. S. 238. See also *Li Sing v. U. S.*, (1901) 180 U. S. 495.

The provisions of the Federal Constitution apply not only to citizens of the United States and to aliens permissively therein, but can be invoked by an alien who came and remained in the country in violation of the express law thereof. An alien who comes into this

country against the consent of the government, and even contrary to the law expressly excluding him, does not thereby become an enemy; so long as he remains within our borders, and so long as our government remains on terms of peace and amity with the country of which he is a subject, he must be regarded as a friendly alien. *U. S. v. Wong Dep Ken*, (1893) 57 Fed. Rep. 211.

2. Deportation of Aliens.—The constitutional, statutory, and common-law provisions and rules in respect to criminal prosecutions have no application to the mere expulsion or deportation of such Chinese persons as came here contrary to and in violation of the laws of the United States.

U. S. v. Wong Dep Ken, (1893) 57 Fed. Rep. 207, holding that so much of section 4 of the Act of May 5, 1892, known as the "Geary Act," providing for the imprisonment at hard labor for a period not exceeding one year of any Chinese person, or person of

Chinese descent, convicted and adjudged by the commissioner to be not lawfully entitled to be or remain in the United States, is clearly in conflict with this clause. See also *In re Ah Yuk*, (1893) 53 Fed. Rep. 781.

V. APPLICATION TO CONSULAR CRIMINAL COURTS. — Statutes giving consuls criminal jurisdiction are not invalid for not preserving to an accused person the right to be tried only after presentment or indictment by a grand jury.

In re Ross, (1890) 44 Fed. Rep. 185, *affirmed* (1891) 140 U. S. 459.

VI. APPLICATION TO LOCAL LEGISLATION OF INDIAN NATIONS. — This amendment does not apply to the local legislation of the Cherokee nation, so as to require all prosecutions for offenses committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The powers of local government exercised by the Cherokee nation are not federal powers created by, and springing from, the Constitution of the United States, but are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Congress.

Talton v. Mayes, (1896) 163 U. S. 382.

An Indian treaty provided that heads of families of the tribes affected by the treaty might select, within the reservation, a tract of land not exceeding three hundred and twenty acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection, so long as he or his family might continue to cultivate the land, in which there is an article that "no treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or

force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article III. (VI.) of this treaty." It was held that this provision did not have the effect of bringing the interest of the tribes within the protection of the Fifth Amendment and under the control of the judicial branch of the government. *Lone Wolf v. Hitchcock*, (1903) 187 U. S. 563.

VII. APPLICATION TO ANNEXED TERRITORY. — The provision in the resolution annexing the Hawaiian Islands, that the municipal legislation not "contrary to the Constitution of the United States" should remain in force, was not intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common-law proceedings by grand and petit jury, and there may be a conviction for manslaughter on an indictment not found by a grand jury.

Hawaii v. Mankichi, (1903) 190 U. S. 211.

VIII. WHAT CONSTITUTES AN INFAMOUS CRIME. — A crime which is punishable by imprisonment in the state prison or penitentiary is an infamous crime, whether the accused is or is not sentenced or put to hard labor; and, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.

In re Claassen, (1891) 140 U. S. 205. See *U. S. v. Wynn*, (1882) 9 Fed. Rep. 394; *U. S. v. Block*, (1877) 4 Sawy. (U. S.) 211, 24 Fed. Cas. No. 14,609; *U. S. v. Maxwell*, (1878) 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750.

The leading word "capital," describing the crime by its punishment only, the associated words "or otherwise infamous crime" must, by an elementary rule of construction, include

crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them. *Ex p. Wilson*, (1885) 114 U. S. 423.

The test is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one; when the accused is in danger of

being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury. The Constitution protecting every one from being prosecuted in a court of the United States, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure, or competent to defeat, the constitutional safeguard. *Mackin v. U. S.*, (1886) 117 U. S. 351. See also *Ex p. McClusky*, (1889) 40 Fed. Rep. 74.

An offense for the commission of which the court can order the accused to be imprisoned in the penitentiary, is an infamous crime within the meaning of this amendment. *Parkinson v. U. S.*, (1887) 121 U. S. 281.

Imprisonment in penitentiary.—A prosecution which results in a sentence to imprisonment in a state penitentiary, is one for an infamous crime within the meaning of this provision. *Ex p. Bain*, (1887) 121 U. S. 13. See also *U. S. v. Brady*, (D. C. 1881) 3 Crim. L. Mag. 69.

A crime punishable by imprisonment for a term of years at hard labor is an infamous crime within the meaning of this amendment. *Ex p. Wilson*, (1885) 114 U. S. 420, wherein the court said: "By the law of England, informations by the attorney-general, without the intervention of a grand jury, were not allowed for capital crimes, nor for any felony by which was understood any offense which at common law occasioned a total forfeiture of the offender's lands, or goods, or both. 4 Bl. Com. 94, 95, 310. The question whether the prosecution must be by indictment, or might be by information, thus depended upon the consequences to the convict himself. The Fifth Amendment, declaring in what cases a grand jury should be necessary, and in effect affirming the rule of the common law upon the same subject, substituting only, for capital crimes or felonies, 'a capital or otherwise infamous crime,' manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses," and "within the last fifteen years, prosecutions by information have greatly increased, and the general current of opinion in the Circuit and District Courts has been towards sustaining them for any crime, a conviction of which would not at common law have disqualified the convict to be a witness. *U. S. v. Shepard*, (1870) 1 Abb. U. S. 431; *U. S. v. Maxwell*, (1875) 3 Dill. (U. S.) 275; *U. S. v. Block*, (1877) 4 Sawy. (U. S.) 211; *U. S. v. Miller*, (1878) 3 Hughes (U. S.) 553; *U. S. v. Baugh*, (1880) 4 Hughes (U. S.) 501; *U. S. v. Yates*, (1881) 6 Fed. Rep. 861; *U. S. v. Field*, (1883) 21 Blatchf. (U. S.) 330; *In re Wilson*, (1883) 18 Fed. Rep. 33. But, for the reasons above stated, having regard to the object and the terms of the first provision of the Fifth Amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted,

to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court. The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."

A punishment prescribed of not less than five nor more than ten years' imprisonment, makes the offense an infamous one. *U. S. v. Cadwallader*, (1893) 59 Fed. Rep. 679.

If a crime charged would, upon conviction, authorize a sentence to the penitentiary, and in fact subject the accused to a term of hard labor, it is infamous and cannot be prosecuted by information. *U. S. v. Tod*, (1885) 25 Fed. Rep. 815.

A prosecution under section 5506, R. S., which denounces as the punishment of the offense charged a fine of not less than five hundred dollars, or imprisonment for not less than one month nor more than one year, or both fine and imprisonment, must be by indictment or presentment and not by information, as, under the authority of section 5546, R. S., convicts sentenced to imprisonment for twelve months are sent to penitentiaries outside the state. *U. S. v. Smith*, (1889) 40 Fed. Rep. 755.

Section 5541, R. S., provides that "in every case where any person convicted of any offense against the United States is sentenced * * * for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose." A case prosecuted under the provisions of section 5512, R. S., in which the punishment defined may be confinement for a period of three years, and under which, if convicted, the defendant may be confined in a state prison or penitentiary according to the provisions of section 5541, R. S., above quoted, cannot be prosecuted by information, but only on a presentment or indictment by a grand jury. *U. S. v. Cobb*, (1890) 43 Fed. Rep. 570.

Prosecutions for violations of sections 2865, 3242, and 3244, R. S., the offenses under which may be punished by imprisonment for a term not exceeding two years, must be by indictments and presentments. *U. S. v. Johannesen*, (1888) 35 Fed. Rep. 411.

The offense defined in subdivision 6 of section 5132, R. S., providing that "every person respecting whom proceedings in bankruptcy are commenced, * * * who, with intent to defraud, wilfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this title

to be described therein; * * * shall be punishable by imprisonment, with or without hard labor, for not more than three years," may be prosecuted by information. *U. S. v. Block*, (1877) 4 Sawy. (U. S.) 211, 24 Fed. Cas. No. 14,609.

With or without hard labor.—Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. *U. S. v. DeWalt*, (1888) 128 U. S. 393. See also *Mackin v. U. S.*, (1880) 117 U. S. 350, wherein the court said: "The Fifth Amendment had in view the rule of the common law, governing the mode of prosecuting those accused of crime, by which an information by the attorney-general, without the intervention of a grand jury, was not allowed for a capital crime, nor for any felony; rather than the rule of evidence, by which those convicted of crimes of a certain character were disqualified to testify as witnesses. In other words, of the two kinds of infamy known to the law of England before the Declaration of Independence, the constitutional amendment looked to the one founded on the opinions of the people respecting the mode of punishment, rather than that founded on the construction of law respecting the future credibility of the delinquent. The leading word 'capital' describing the crime by its punishment only, the associated words 'or otherwise infamous crime' must, by an elementary rule of construction, be held to include any crime subject to an infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them. Having regard to the object and the terms of the amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may lawfully be imposed by the court."

It is not necessary, to make a punishment infamous, that the law shall require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state prison or penitentiary, either with or without hard labor, his punishment is infamous. The punishment is no less infamous when the convict may, under the law, be put to hard labor in the prison, although not in terms sentenced to it, than when the sentence, in obedience to the law, sets it out. The punishment is equally infamous in both cases. When the accused is in danger of being subjected to an infamous punishment, if convicted, the crime of which he is accused is an infamous crime. *Ex p. McClusky*, (1889) 40 Fed. Rep. 73.

Larceny.—The crime of larceny is one for which, upon finding of guilty, the court is authorized to assess an infamous punishment, and therefore can be prosecuted only by indictment. *U. S. v. Fuller*, (1886) 3 N. Mex. 367.

Stealing mail.—An offense under section 5469, R. S., providing that "any person who

shall steal the mail, or steal or take from or out of any mail or post office, etc., any letter or packet; any person who shall take the mail, or any letter or packet therefrom, or from any post office, etc., with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter, or package which shall contain any note, bond, etc.; * * * any person who shall by fraud or deception obtain from any person having custody thereof any such mail, letter, etc., shall although not employed in the postal service be punishable by imprisonment at hard labor for not less than one year and not more than five years," may be prosecuted by information. *U. S. v. Wynn*, (1882) 9 Fed. Rep. 886.

Petty larceny and the receiving of stolen goods amounting to less than thirty-five dollars in value, are made by the Act creating the police courts offenses which are punishable only by imprisonment in a jail of the District of Columbia and are purely non-infamous offenses. *Matter of Fry*, (1884) 3 Mackey (D. C.) 138.

Embezzlement may be tried on an information filed by the district attorney. *U. S. v. Reilley*, (1884) 20 Fed. Rep. 46.

The charge of **misapplying the funds of a national bank** by its cashier is a charge of an "infamous crime" which, under the Constitution of the United States, must be instituted by indictment of a grand jury, and cannot be prosecuted by a mere information filed by the district attorney with the assent of the court. *U. S. v. Hade*, (1877) 26 Fed. Cas. No. 15,274.

Passing counterfeited government obligation.—The offense of passing a counterfeited obligation of the United States was held not to be an infamous crime within the meaning of the Constitution, the court saying: "It has been repeatedly held that the fact that an offense may or must be punishable by imprisonment in a penitentiary does not make it in law infamous." *In re Wilson*, (1883) 18 Fed. Rep. 34. See also *U. S. v. Field*, (1883) 16 Fed. Rep. 778, and *U. S. v. Yates*, (1881) 6 Fed. Rep. 861, as to passing counterfeit money. And see *U. S. v. Petit*, (1882) 11 Fed. Rep. 58.

A conspiracy to make counterfeit coin is not an infamous crime. *U. S. v. Burgeas*, (1882) 9 Fed. Rep. 696.

Keeping liquors with intent to sell.—A criminal proceeding commenced before a justice of the peace, charging that intoxicating liquors were kept with intent to sell the same in violation of a statute, is not one of a "capital or otherwise infamous crime," which, by the Constitution of the United States, must be tried under indictment or presentment. *State v. Bryan*, (1856) 4 Iowa 340.

Application to misdemeanors.—Congress by proposing, and the states by ratifying, that amendment left all offenses not capital or in-

famous to be prosecuted by information or by indictment, as the circumstances of each case should seem to require, and as the common law would sanction. Indeed, this constitutional provision produced no change in the practice or law, except, perhaps, as regards a class of misdemeanors regarded as infamous crimes, and which might, before the amendment, be prosecuted by information. The amendment, however, fixed the matter, beyond the power of Congress or the courts to alter the course of proceeding in bringing forward a charge of crime, in the class of cases embraced by the provision. *U. S. v. Shepard*, (1870) 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273.

These provisions, as to the mode of prosecuting capital and other infamous offenses, have no application to a misdemeanor. *U. S. v. Maxwell*, (1875) 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750. See also *U. S. v. Waller*, (1871) 1 Sawy. (U. S.) 701, 28 Fed. Cas. No. 16,634; *Green v. State*, (1903) 119 Ga. 120.

Changes of Public Opinion from One Age to Another may affect the question as to what punishments shall be considered as infamous.

Mackin v. U. S., (1886) 117 U. S. 351.

IX. INDICTMENT BEFORE REMOVAL UNDER SECTION 1014, R. S. — On a petition for removal of an accused from one district to another, under section 1014, R. S., an indictment in the district to which removal is sought is at least *prima facie* evidence of the existence of probable cause. "The Constitution does not require two such inquiries and adjudications. The government, having once satisfied the provision for an inquiry and obtained an adjudication by the proper tribunal of the existence of probable cause, ought to be able without further litigation concerning that fact to bring the party charged into court for trial."

Beavers v. Henkel, (1904) 194 U. S. 84.

X. CHANGE IN INDICTMENT. — A party can only be tried upon the indictment as found by the grand jury, and especially upon its language found in the *charging* part of the instrument. A change in the indictment deprives the court of the power of proceeding to try the accused. There is nothing before the court on which it can hear evidence or pronounce sentence.

Ex p. Bain case the court the language on, as indicated construction place our condition of ment. Un article had for sidering the crown on imbedded value of

121 U. S. 12, in which In the construction of constitution here relied her instances where necessary, we are to as possible in the framed that instru framers of this article been absorbed in con encroachments of the e subject, and were law estimate of the as part of its sys-

The Act of July 13, 1866, providing that "all fines, penalties, and forfeitures which may be imposed or incurred shall and may be sued for and recovered, when not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding before any Circuit or District Court," was held to authorize a proceeding by information charging a misdemeanor under the revenue laws, and valid. *U. S. v. Ebert*, (1874) 1 Cent. L. J. 205, 25 Fed. Cas. No. 15,019.

The converse of this amendment holds good, that persons may be held to answer for crimes other than such as are capital or infamous, upon information or indictment, according to the course of the common law. *U. S. v. Shepard*, (1870) 1 Abb. (U. S.) 431, 27 Fed. Cas. No. 16,273.

The clause leaves all offenses open to prosecution by information, except those which are capital or infamous, when there is no enactment of Congress preventing a resort to this mode of procedure. *U. S. v. Maxwell*, (1875) 3 Dill. (U. S.) 275, 26 Fed. Cas. No. 15,750.

tem of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged." See also *U. S. v. Harmon*, (1888) 34 Fed. Rep. 872.

XI. COURTS-MARTIAL — 1. In General. — This amendment, instead of limiting the jurisdiction of courts-martial, leaves it to be exercised to the fullest extent, under such “rules for the government and regulation of the land and naval forces” as Congress might, under the power given to it by the Constitution, see fit to prescribe.

Runkle v. U. S., (1884) 19 Ct. Cl. 411. See also *Ex p. Reed*, (1879) 100 U. S. 21.

2. “Cases Arising in the Land or Naval Forces.” — The Fifth Article of Amendment to the Constitution, which declares that “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury,” expressly excepts “cases arising in the land or naval forces,” and leaves such cases subject to the rules for the government and regulation of those forces which, by the eighth section of the First Article of the Constitution, Congress is empowered to make.

Kurtz v. Moffitt, (1885) 115 U. S. 500.

Offenses After Discharge While Undergoing Imprisonment. — Section 12 of the Act of March 3, 1873, providing “that all prisoners under confinement in said military prisons undergoing sentences of court-martial shall be liable to trial and punishment by courts-martial under the rules and articles of war for offenses committed during said confinement,” is constitutional, as applied to one under confinement in a military prison, who at the time of the sentence was also sentenced to be dishonorably discharged from the military service. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under sentence of a court-martial, for the purpose of enforcing discipline and punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held.

In re Craig, (1895) 70 Fed. Rep. 969.

Arrest and Prosecution After Connection with Service Severed. — An offense committed while in actual service, though an arrest and commencement of the prosecution are not made before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal, or other discharge, is a “case arising in the naval forces,” and Congress has power to authorize a trial after the connection is so severed; and after the accused has become a private citizen.

In re Bogart, (1873) 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

3. “When in Actual Service in Time of War or Public Danger.” — The words “when in actual service in time of war or public danger” apply to the militia only. All persons in the military or naval service of the United States are subject to the military law; the members of the regular army and navy at all times, the militia so long as they are in such service.

Johnson v. Sayre, (1895) 158 U. S. 114.
See also *Ex p. Mason*, (1881) 105 U. S. 700.

The clause "when in actual service in time of war or public danger" evidently only refers to the militia. It has no reference to the army or navy of the United States. A good reason for this distinction may be found in the fact that it is only at those times that the militia are under the jurisdiction and control of the general government; while the army and navy of the United States are always in the service of the government, and there is as much necessity for preserving their discipline, morale, and efficiency in peace as in time of war. *In re Bogart*, (1873) 2 Sawy. (U. S.) 396, 3 Fed. Cas. No. 1,596.

The arrangement of the excepting clause to the Fifth Amendment obviously imports

that the qualification of actual service and a state of war or public danger applies to the militia alone. By the provisions of the first section the militia are liable to be called into the service of the United States, and placed under their government, only under the existence of the exigencies of public danger in war. The terms of the limitation would therefore apply to this peculiar service exacted from the militia, but would be unusual and extraordinary in respect to forces under the regular enlistment, and whose subjection to the authority of the general government had no necessary connection with a condition of war or public danger. The power of Congress over the land and naval forces is irrespective of the actual condition of the country, and is the same in time of peace as in the time of war or public danger. *U. S. v. Mackenzie*, 1 N. Y. Leg. Obs. 371, 30 Fed. Cas. No. 18,313.

XII. WAIVER OF CONSTITUTIONAL RIGHT. — A party cannot waive a constitutional right when its effect is to give a court jurisdiction. This amendment provides for a requisite to jurisdiction, and if the crime is of such a nature that an indictment to warrant a prosecution of the crime is required by the law, the court has no jurisdiction to try without such indictment.

Ex p. McClusky, (1889) 40 Fed. Rep. 74, wherein it was held that by pleading guilty to a charge preferred by an information when an indictment to warrant a prosecution of the

crime is required by law, a defendant does not deprive himself of the right to regain his liberty by habeas corpus.

AMENDMENT V.

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

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I. NOT A LIMITATION ON THE STATES. — This amendment is clearly a limitation upon the powers of the federal government, and is not a limitation upon the states.

In re Boggs, (1891) 45 Fed. Rep. 475.

That this amendment is not a limitation upon the powers of the states, see also *supra*, p. 258.

II. PROCEEDINGS IN COURTS OF DIFFERENT JURISDICTIONS — 1. **Federal and State Courts.** — An acquittal in a state court of a charge of murder cannot be pleaded in bar of an indictment in a federal court, on the same facts, charging the defendant, being a white man, with the killing of an Indian. A person living under two governments or jurisdictions as does every inhabitant of the states of this Union, may commit two crimes by doing or omitting one act — one against the state and the other against the United States. And in such case the conviction or acquittal of the one crime in a forum of the state is no bar to a prosecution for the other in a forum of the United States.

U. S. v. Barnhart, (1884) 22 Fed. Rep. 290.

The prohibition in this clause was not designed as a limit upon the state governments in reference to their own citizens. It is exclusively a restriction upon federal power, intended to prevent interference with the rights of the states and of their citizens. Even if Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated upon citizens of a state because an instrument in effecting that cheat was a counterfeited coin of the United States, the fact that a state makes it an offense to pass counterfeited coin would not be open to the objection that a person charged with that offense would be subject to be twice put in jeopardy of life or limb. *Fox v. Ohio*, (1847) 5 How. (U. S.) 434.

It is no objection to a state statute that an offender thereunder may be liable to punishment under an Act of Congress for the

same act. "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, an assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Moore v. Illinois*, (1852) 14 How. (U. S.) 20.

2. **Proceeding by Congress Against Member, and Criminal Prosecution.** — A conviction and sentence of an individual, not a member of Congress, by the House of Representatives of the United States, for a breach of privilege by assault and battery upon a member of the House, for or on account of words by him spoken in the House of Representatives, in debate, are not a bar to a criminal prosecution by indictment for the assault and battery.

U. S. v. Houston, (1832) 4 Cranch (C. C.) 261, 26 Fed. Cas. No. 15,398.

3. **Crime Against the Law of Nations Tried in Any Civilized Court.** — Robbery on the seas is considered an offense within the criminal jurisdiction of all

nations. It is against all, and punished by all; and there can be no doubt that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state.

U. S. v. Bowers, (1820) 5 Wheat. (U. S.) 197.

4. Civil Courts and Courts-martial — a. PROCEEDINGS BY COURT-MARTIAL. — The finding of a military court of inquiry acquitting a person of all blame is not a complete bar to a prosecution in the civil courts. If the civil courts have jurisdiction of an offense, notwithstanding the concurrent jurisdiction by court-martial of military offenses, it follows that the proceedings in one cannot be pleaded in bar to proceedings in the other, and if the finding of such court should conflict with the well-recognized principles of the civil law it should be disregarded. At the same time, weight should be given to the finding as an expression of the opinion of the military court of the magnitude of the offense.

U. S. v. Clark, (1887) 31 Fed. Rep. 715.

Proceedings of a court-martial are a bar to subsequent indictments in courts of common law for the same offense, the parties there being the same likewise, and the tribunal acquitting competent to examine and acquit. *Wilkes v. Dinsman*, (1849) 7 How. (U. S.) 123. But *Steiner's Case — Civil Responsibility of Army*, (1854) 6 Op. Atty-Gen. 419, referring to this as a dictum, said: "That may be so, in the strict meaning of the words 'same offense.' But the position cannot be admitted, if intended to cover all the criminal relations of the same act. An officer, on account of one and the same act, may be tried for assault at common law, and for ungentlemanly conduct by the law martial, and either may precede the other."

An acquittal before a court-martial cannot be pleaded in defense of an indictment in a court of law, even though the offense charged in both cases be substantially the same. *U. S. v. Cashiel*, (1863) 1 Hughes (U. S.) 552, 25 Fed. Cas. No. 14,744, refusing to follow the dictum in *Wilkes v. Dinsman*, (1849) 7 How. (U. S.) 123, which was an action of trespass brought by a marine against an officer for punishment inflicted on the plaintiff. A court-martial had acquitted the defendant of the charge, and upon the propriety of rejection by the trial court of the record of the

proceedings of the court-martial, the Supreme Court said: "We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offense."

A trial and acquittal by a court-martial are not a bar to an inquiry and prosecution by the proper civil authorities. *In re Fair*, (1900) 100 Fed. Rep. 151.

Bar to prosecution in courts of insurgent state. — A conviction by a court-martial of one serving in the Union army, while the United States were in occupation of a state as a military district, was held to be a bar to a prosecution in the state courts for the same offense. *Coleman v. Tennessee*, (1878) 97 U. S. 516, wherein the court said: "If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt. The fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other, for offenses committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded."

b. CIVIL TRIAL AS A BAR TO COURT-MARTIAL. — An officer or soldier of the army, who does an act criminal both by the military and the general law, is subject to be tried by the latter in preference to the former, under certain conditions and limitations. But his conviction or acquittal, by the civil authorities, of the offense against the general law, does not discharge him from responsibility for the military offense involved in the same facts.

Steiner's Case — Civil Responsibility of Army, (1854) 6 Op. Atty-Gen. 413.

III. THE BAR MUST BE PLEADED. — A former conviction must be pleaded.

U. S. v. Wilson, (1833) 7 Pet. (U. S.) 159.

IV. WHAT CONSTITUTES JEOPARDY — 1. In General. — The prohibition is not against being twice punished, but against being twice put in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.

U. S. v. Ball, (1896) 163 U. S. 662.

A prisoner is said to be put in jeopardy whenever he is put on trial before a competent court and jury under a valid indictment, and the jury are said to be charged when they are impaneled and sworn. *Ex p. Glenn*, (1901) 111 Fed. Rep. 261.

When the trial of an indictment has been commenced by the swearing of a jury, the defendant is in their charge, and is entitled to a verdict of acquittal if the case on the part of the prosecution is, for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict, or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper. *U. S. v. Wat-*

son, (1868) 3 Ben. (U. S.) 1, 28 Fed. Cas. No. 16,651.

The jeopardy spoken of in this article can be interpreted to mean nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon. This was the meaning affixed to the expression by the common law, notwithstanding some loose expressions to be found in some elementary treatises, or in the opinions of some judges, which would seem to intimate a different opinion. *U. S. v. Haskell*, (1823) 4 Wash. (U. S.) 402, 26 Fed. Cas. No. 15,321. See also *U. S. v. Morris*, (1851) 1 Curt. (U. S.) 23, 26 Fed. Cas. No. 15,815; *State v. Moor*, (1823) Walk. (Miss.) 134. But the doctrine stated in *Ex p. Glenn*, (1901) 111 Fed. Rep. 261, that a prisoner is put in jeopardy when the jury are impaneled and sworn, seems to prevail now in the federal courts.

2. As Understood at Common Law. — It is very clearly the spirit of this clause to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection.

Ex p. Lange, (1873) 18 Wall. (U. S.) 170.

Resort should be had to the common law to ascertain the true meaning of this clause, as the prohibition is a recognition of an old maxim of the common law. *U. S. v. Gilbert*, (1834) 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15,204.

"In the conflict of opinion between some of the state courts and other state and federal tribunals as to the construction of a clause of the Constitution of the United States, we feel constrained to conform to the decisions of those courts which were especially ordained and established by it, and invested with authority to construe that instrument. Hence, we adopt the conclusion that the

clause of the fifth article of the Amendments of the Constitution of the United States, viz., 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb,' being 'a maxim imbedded in the very elements of the common law,' and incorporated into that instrument, is properly interpreted by the authorized exposition established at its adoption. 'At common law it meant nothing more than that where there had been a final verdict either of acquittal or conviction, on an adequate indictment, the defendant could not be a second time placed in jeopardy for the particular offense.' 147 Wharton's Crim. Law, and cases there cited." *Hoffman v. State*, (1863) 20 Md. 434.

V. APPLICATION OF CLAUSE TO OFFENSES — 1. Misdemeanors. — This constitutional guaranty by a liberal construction is held to apply to misdemeanors as well as to treason and felony.

Berkowitz v. U. S., (C. C. A. 1899) 93 Fed. Rep. 452.

2. Criminal Proceedings and Suits for Penalties in Rem. — Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*.

Coffey v. U. S., (1886) 116 U. S. 443.

A conviction under an indictment for a conspiracy to defraud the government out of taxes due on whiskey, in pursuit of which conspiracy the defendant and others did unlawfully remove the whiskey, is a bar to a civil action to recover a statutory penalty for the same offenses. If the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action, though the civil suit be under one section and the criminal suit under another section of the Revised Statutes. *U. S. v. McKee*, (1877) 4 Dill. (U. S.) 128, 26 Fed. Cas. No. 15,688.

A conviction of a stockholder and secretary of a company, charging that he had committed unlawful acts against the revenue laws while secretary of the company, is a bar to an information for the forfeiture of certain personal and real property owned and occupied by the company, charging acts committed with the design to avoid payment of taxes. The circumstances that the plea in bar was entered by other stockholders who had not been prosecuted for the fraudulent acts and omissions that were made the basis of the action for forfeiture did not relieve the government's case of the difficulty. *U. S. v. One Distillery*, (1890) 43 Fed. Rep. 846.

Forfeiture not a bar to a criminal action.—Section 3318, R. S., providing that whenever any rectifier or wholesale liquor dealer does what is specified therein, he shall pay a penalty of one hundred dollars, and shall, on conviction, be fined and imprisoned, does not violate this clause, and a judgment in a civil action "that the plaintiffs have judgment for their claim, together with costs and disbursements of this action, to wit, the sum of one hundred dollars, and that they have execution therefor," is not a bar to a criminal action under the statute for the same cause. *Matter of Leszynsky*, (1879) 16 Blatchf. (U. S.) 9, 15 Fed. Cas. No. 8,279.

Conviction is not a bar to a suit in rem.—A conviction of aiding in the removal to a place other than the distillery warehouse, provided by law, of distilled spirits on which the tax imposed by law had not been paid, is not a bar to an information for forfeiture for carrying on the business of a distiller with the intent to defraud the United States of the tax on spirits. This provision of the Constitution is not a limitation upon the kinds of punishment which may be inflicted for an offense, hence there may be a fine and imprisonment and forfeiture for the same offense if the law so provides. *U. S. v. Three Copper Stills*, (1890) 47 Fed. Rep. 499, wherein the court, referring to the *Coffey v. U. S.*, (1886) 116 U. S. 445, and *U. S. v. McKee*, (1877) 4 Dill. (U. S.) 128, cases, said: "Although the court in that case [*Coffey v. U. S.*, (1886) 116 U. S. 445] declined to express an opinion as to whether a conviction on an indictment under section 3257 could be availed of as

conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, it must necessarily follow from the reasoning of the court that, if an acquittal is conclusive on the United States, a conviction must be conclusive on the convicted claimant. * * * There is no case known to me which decides that this constitutional provision includes a proceeding *in rem*, which is a civil action, within its inhibition. It is true that the reasons given for the decision in *U. S. v. McKee*, (1877) 4 Dill. (U. S.) 128, would indicate that the fact the second proceeding was a civil action would make no difference as to the application of this constitutional provision, but that case differs from the one at bar in that it was a direct proceeding against McKee, and sought to secure double taxes for the same offense for which he had been convicted and sentenced. This is certainly a very broad application of this provision of the Constitution, but, broad as it is, it does not cover a proceeding *in rem* to forfeit a thing subject under an express statute because of its status, use, or location, and that without regard to the guilt or innocence of the owner of the thing. This case—*U. S. v. McKee*, (1877) 4 Dill. (U. S.) 128—is referred to in the case of *Coffey v. U. S.*, (1886) 116 U. S. 445, and the reason for that decision given; but I do not understand the reason given for the decision is approved and declared applicable to a proceeding *in rem*. The reason given by the Supreme Court in *Coffey v. U. S.*, (1886) 116 U. S. 445, is entirely different, as we have seen; and this is a most significant fact, since, if the reasoning of the court in *U. S. v. McKee* had been adopted and made applicable, it would have been conclusive of that case and all others like it, whether there was a conviction or an acquittal. But the reasons given by the Supreme Court prove, we think, that it did not intend to declare or intimate that the proceeding *in rem* taken to forfeit property claimed by Coffey was putting him 'twice in jeopardy of life or limb,' within the meaning of the constitutional prohibition. Indeed, the language of the court seems to put that beyond controversy. The court says, 116 U. S. 443: 'Whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, and whether a judgment of forfeiture in a suit *in rem* under it would be conclusive evidence in law for a conviction on a subsequent indictment under it, are questions not now presented.' If there is inference to be drawn from this language, it is rather that there could be a subsequent suit *in rem* or a subsequent indictment, as the case might require. If not this, there is certainly no indication that there could be only an indictment or a proceeding *in rem*, and that the United States would be forced to elect which it would pursue."

A judgment of forfeiture in an action *in rem* is not a bar to a criminal action involving the same facts. *U. S. v. Olsen*, (1893) 57 Fed. Rep. 579.

3. Identical Offense. — A former trial, to be a bar, must be a trial for the same identical offense; or, in other words, for the transgression of the same law.

U. S. v. Cashiel, (1863) 1 Hughes (U. S.) 552, 25 Fed. Cas. No. 14,744.

Upon a plea of former conviction or acquittal, it must appear that the crime for

which the defendant was first indicted or acquitted was the same for which he is prosecuted. *U. S. v. Houston*, (1832) 4 Cranch (C. C.) 261, 26 Fed. Cas. No. 15,398.

4. Criterion of Identity of Crimes. — The criterion of identity of crimes is, whether the facts charged in one indictment would have been sufficient to justify a conviction and judgment upon the other, by the court in which the first conviction was had. For, although the facts charged in the second indictment constitute a part of the matter necessary to support the first, yet, if the facts averred in the second indictment are sufficient, of themselves, to constitute a crime, and the first court has not jurisdiction of the crime thus charged in the second indictment, neither a conviction nor an acquittal upon the first indictment will be a bar to the second.

U. S. v. Houston, (1832) 4 Cranch (C. C.) 261, 26 Fed. Cas. No. 15,398.

That the defendants could not, under an earlier indictment, have been convicted of the offense embraced in a later one, nor would the evidence be necessary to support the later

indictment have been sufficient to produce a legal conviction upon the earlier one, is a proper test as to whether a plea to a former conviction or former acquittal is good or bad. *U. S. v. Flecke*, (1868) 2 Ben. (U. S.) 456, 25 Fed. Cas. No. 15,120.

5. Offenses Involving the Same Incidents. — After conviction on an indictment for unlawful cohabitation, under an Act of Congress for the suppression of polygamy, the defendant cannot be convicted on an indictment for adultery, involving the same incidents as on the first indictment and conviction, without being put twice in jeopardy.

Nielsen, Petitioner, (1889) 131 U. S. 176, wherein the court said that where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

Same incidents in various offenses. — Upon an indictment for murder, a general acquittal or conviction is a bar to a subsequent indictment for manslaughter upon the same killing. So, an acquittal or conviction, upon an indictment for petit treason, is a bar to a subsequent indictment for murder. So, upon an indictment of grand larceny, a general acquittal or conviction is a bar to a subsequent indictment for petit larceny for the same taking. But the reason, in all those cases, is that the defendant may, upon the first indictment, be found guilty of, and punished by that court for, the offense charged in the

second. And the reason why he may be so found guilty and punished by that court upon the first indictment is that the nature of the offense is the same, and the only difference is in the degree of punishment, the court having jurisdiction of both. *U. S. v. Houston*, (1832) 4 Cranch (C. C.) 261, 26 Fed. Cas. No. 15,398.

A conviction for stealing a pocketbook is a conviction of stealing all that it contained at the time of the theft, belonging to the same owner. *U. S. v. John*, (1833) 4 Cranch (C. C.) 336, 26 Fed. Cas. No. 15,479. See also *U. S. v. Lee*, (1834) 4 Cranch (C. C.) 446, 26 Fed. Cas. No. 15,586.

But see *infra*, p. 270, *Distinct Offenses* — *Assault and Battery and Murder*, where a new fact supervenes after the first prosecution, as in the case of a conviction for assault and battery, and death subsequently ensues.

6. Distinct Offenses — *a. IN GENERAL.* — When the indictment is for a distinct offense from that on which the verdict in the previous trial was found, a plea of former jeopardy cannot be sustained.

U. S. v. Randenbush, (1834) 8 Pet. (U. S.) 289.

b. CONSPIRACY AND ACTUAL COMMISSION OF OFFENSE. — A conviction or acquittal on a charge of conspiracy to commit an offense, as of conspiracy

to utter a false certificate of naturalization, is not a bar to an indictment for the actual commission of the offense which the accused had been charged with having conspired to commit. A conviction of one on a charge of conspiracy to utter a false certificate of naturalization does not show that he uttered such certificate. It may have been uttered solely by a co-conspirator. So an acquittal of one on such a charge is not in the least inconsistent with his having uttered such certificate. There may have been a failure to prove a conspiracy.

Berkowitz v. U. S., (C. C. A. 1899) 93 Fed. Rep. 457.

c. ASSAULT AND BATTERY AND MURDER. — One who has been convicted and sentenced on a charge of assault and battery has not been twice put in jeopardy by being subsequently convicted of murder when the person assaulted died subsequently to the first conviction.

Hopkins v. U. S., (1894) 4 App. Cas. (D. C.) 436, on which point the court said: "The great weight of authority is in support of the principle that when, after the first prosecution, a new fact supervenes, for which the accused is responsible, which changes the

character of the offense, and together with the facts existing at the time constitutes a new and distinct crime, an acquittal or conviction of the first offense is not a bar to an indictment for the other distinct crime."

d. COUNTERFEITING NOTES AT DIFFERENT TIMES. — The counterfeiting of notes at different times, although all apparently of the same series and printed from the same plate, constitutes distinct offenses.

Bliss v. U. S., (C. C. A. 1900) 105 Fed. Rep. 508.

e. PASSING COUNTERFEIT NOTES AT DIFFERENT TIMES. — Upon an indictment for passing a counterfeit note with intent to defraud, the defendant cannot successfully plead that the note described in the indictment had been theretofore given in evidence on the trial upon a former indictment found against him for passing another counterfeit note.

U. S. v. Randenbush, (1834) 8 Pet. (U. S.) 239.

f. DISTILLING WITHOUT PAYING TAX, AND USING STILL. — Where defendants had been indicted under an internal revenue Act for knowingly carrying on the business of a distillery without having paid the special tax, on which indictment they were tried and acquitted, the ground of the acquittal being that they were not the principals who were bound to pay the tax, and who were afterwards indicted under the same statute for knowingly using the still for the purpose of distilling, in a certain dwelling house, the evidence on the trial of the first indictment showing that the place of the offense charged was the same dwelling house, a plea of former acquittal founded on the acquittal under the first indictment could not be sustained.

U. S. v. Flecke, (1868) 2 Ben. (U. S.) 456, 25 Fed. Cas. No. 15,120.

g. KEEPING FARO BANK AND KEEPING DISORDERLY HOUSE. — A conviction of the offense of keeping a faro bank, contrary to a by-law of a municipal corporation, is no bar to an indictment at common law for keeping a disorderly house, supported by the same evidence.

U. S. v. Hood, (1817) 2 Cranch (C. C.) 133, 26 Fed. Cas. No. 15,385.

h. FORGING AN ORDER LAID TO DEFRAUD DIFFERENT PERSONS. — An acquittal upon an indictment for forging an order with intent to defraud John Lang, is no bar to an indictment for forging the same order with intent to defraud William Lang.

U. S. v. Book, (1822) 2 Cranch (C. C.) 294, 24 Fed. Cas. No. 14,624.

7. Same Offense a Contempt and Statutory Crime. — The power to punish for contempt remains in each House of Congress and it cannot be held that a statute is invalid because it provides that contumacy in a witness called to testify in a matter properly under consideration by either House, and deliberately refusing to answer questions pertinent thereto, shall be a misdemeanor against the United States.

In re Chapman, (1897) 166 U. S. 672. See *Chapman v. U. S.*, (1896) 8 App. Cas. (D. C.) 302; *Chapman v. U. S.*, (1895) 5 App. Cas. (D. C.) 122.

8. Charge of Perjury in Case on Which Acquitted. — A defendant who had been acquitted upon an indictment for selling liquors without payment of a special tax required by law, was subsequently put upon trial for perjury in swearing upon his preliminary examination before a commissioner that he did not so sell. It was held that a plea of prior acquittal was bad, as the two indictments were not for the same transaction nor sustained by the same evidence.

U. S. v. Butler, (1889) 38 Fed. Rep. 498.

VI. MATTERS OF PLEADING AND PROCEDURE AS INVOLVING JEOPARDY —

1. Indictment Ignored by One Grand Jury. — The ignoring of an indictment by one grand jury is no bar to a subsequent grand jury investigating the charge and finding an indictment for the same offense.

U. S. v. Martin, (1892) 50 Fed. Rep. 918.

2. Upon Defective Indictment. — In England, an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal. "After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."

U. S. v. Ball, (1896) 163 U. S. 662. See also *Kepner v. U. S.*, (1904) 195 U. S. 130.

On a void proceeding or indictment neither at common law nor by the Constitution will an acquittal or conviction operate as a bar to a subsequent indictment for the same offense. *U. S. v. Jones*, (1887) 31 Fed. Rep. 725.

Conviction and nol. pros. upon insufficient

statutory indictment. — A prior conviction and nolle prosequi upon a sufficient indictment at common law, though insufficient under the statute, is a bar to a subsequent prosecution on a new indictment sufficient under the statute for the same offense. *Fletcher v. U. S.*, (1844) 1 Hayw. & H. (D. C.) 186, 9 Fed. Cas. No. 4,868. See also *Fletcher v. U. S.*, (1844) 1 Hayw. & H. (D. C.) 200, 9 Fed. Cas. No. 4,869.

3. Sustaining Demurrer to Valid Information. — On sustaining the demurrer to a valid information, the defendant has not been put in jeopardy, and he may be again arrested and put on trial.

U. S. v. Van Vliet, (1885) 23 Fed. Rep. 35.

4. Variance Caused by Defective Indictment. — Upon a variance, caused by a flaw in the indictment, a verdict of "not guilty" was rendered, but the prisoner was remanded to be tried at the next term on a new indictment.

U. S. v. Smith, (1815) 2 Cranch (C. C.) 111, 27 Fed. Cas. No. 16,326.

5. Pendency of Another Indictment. — The pendency of another indictment for the same offense cannot be pleaded in bar or abatement though it may be a good ground for a motion to quash.

U. S. v. Herbert, (1836) 5 Cranch (C. C.) 87, 26 Fed. Cas. No. 15,354.

6. Effect of Nolle Prosequi. — The prosecuting attorney has a right, with leave of the court, to enter a nolle prosequi on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offense.

U. S. v. Shoemaker, (1840) 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279, wherein the court said that after the jury are impaneled and witnesses sworn, the prosecuting attorney has no right to enter a nolle prosequi because the evidence is not sufficient to convict. "An abandonment of the prosecution, before the defendant is put upon his trial, is the undoubted right of the prosecuting attorney; but after the trial has been commenced the relation of the defendant to the case is materially changed, and this must, to some extent, control the power of the prosecutor. He, it is true, may, in effect, abandon the

prosecution by failing to call witnesses, but it would seem that he cannot do so to the prejudice of the defendant. He cannot abandon it in form, and afterwards renew the same charge. The prisoner stands charged as a culprit, but the law is jealous of his rights, and shields him from oppression. However guilty he may be, he can be convicted only according to law. And a jury having been sworn to try his case, he has a right to their verdict, unless some inevitable occurrence shall interpose and prevent the rendition of a verdict."

7. Impaneling New Jury After Arraignment. — Where a jury was impaneled and sworn to try an indictment, before the defendant had been arraigned or had pleaded to the indictment, and that jury was dismissed, and, after the defendant had pleaded, a new jury was impaneled and sworn, by whom the indictment was tried, and the defendant was convicted, the defendant was not twice put in jeopardy by the proceeding.

U. S. v. Riley, (1864) 5 Blatchf. (U. S.) 204, 27 Fed. Cas. No. 16,164.

8. When Court May Order Discharge of Jury — **α. IN GENERAL.** — Courts of justice are invested with authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would be otherwise defeated, and to order a trial by another jury; and a defendant is not thereby twice put in jeopardy.

Thompson v. U. S., (1894) 155 U. S. 274. See also U. S. v. Watson, (1868) 3 Ben. (U. S.) 1, 28 Fed. Cas. No. 16,651. But see U. S. v. Farring, (1834) 4 Cranch (C. C.) 465, 25 Fed. Cas. No. 15,075.

Order of consolidation rescinded and jury discharged. — Several indictments were pend-

ing in the District of Columbia against a person for embezzlement, and the court directed that they be consolidated under the statute and tried together. A jury was then impaneled and sworn, and the district attorney had made a statement of his case to the jury, when the court took a recess. Upon reconvening, a short time afterwards, the court

decided that the indictments could not be well tried together, directed the jury to be discharged from further consideration of them, and rescinded the order for consolidation. The prisoner was thereupon tried before the same jury on one of those indictments and found guilty. All of this was against his protest and without his consent. The judgment was taken by appeal to the Supreme Court in general term, where it was affirmed. As the court had jurisdiction to decide whether by the action complained of the ac-

cused was twice put in jeopardy, the Supreme Court of the United States could not grant an original habeas corpus to review its action whether the decision was sound or not. *Ex p. Bigelow*, (1885) 113 U. S. 328.

A jury sworn in a criminal case may be discharged by the court, under any sudden and uncontrollable emergency, and such discharge is no bar, even in a capital case, to another trial. *U. S. v. Shoemaker*, (1840) 2 McLean (U. S.) 114, 27 Fed. Cas. No. 16,279.

b. UNABLE TO AGREE.—The discharge of the jury by the court from giving any verdict, without the consent of the prisoner, the jury being unable to agree, is not a bar to a future trial for the same offense.

U. S. v. Perez, (1824) 9 Wheat. (U. S.) 579. See also *Dreyer v. Illinois*, (1902) 187 U. S. 86; *Robertson v. Baldwin*, (1897) 165 U. S. 281; *U. S. v. Workman*, (1807) 28 Fed. Cas. No. 16,764.

"The plea of former jeopardy was rightly held bad. It averred that the discharge of the jury at the former trial without the defendants' consent was by the court, of its own motion, and after the jury, having been in retirement to consider their verdict for forty hours, had announced in open court that they were unable to agree as to these defendants. The further averment that 'there existed in law or fact no emergency or hurry for the discharge of said jury, nor was said discharge demanded for the ends of public justice,' is an allegation, not so much of specific and traversable fact as of inference and opinion, which cannot control the effect of the facts previously alleged. Upon those facts, whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion. *U. S. v. Perez*, (1824) 9 Wheat. (U. S.) 579; *Simmons v. U. S.*, (1891) 142 U. S. 148." *Logan v. U. S.*, (1892) 144 U. S. 297.

The discharge of a jury by the court, where they are unable to agree, without the consent of the accused, is no bar to any future trial for the same offense. The legal necessity for discharging the jury is largely in the discretion of the court. It is sufficient if the record shows that the jury, being unable to agree, were by order of the court discharged, without setting out specifically the circumstances upon which the order of discharge was based. *Kelly v. U. S.*, (1885) 27 Fed. Rep. 618.

c. CONSENT OF DEFENDANT.—With the consent of the defendant a court may discharge a jury from giving a verdict in a case which falls short of being one of manifest necessity, but the record must show affirmatively the consent.

U. S. v. Watson, (1868) 3 Ben. (U. S.) 1, 28 Fed. Cas. No. 16,851.

d. IMPOSSIBLE TO OBTAIN FAIR TRIAL.—When the court concludes, upon information, that circumstances make it impossible for the jury, in considering the case, to act with the independence and freedom on the part of each juror

Length of deliberation in discretion of the court.—When a jury has been discharged by the court for failure to agree upon a verdict, it cannot be successfully contended that the jury was discharged without any legal necessity, and the discharge of the jury for such a cause is not, in the judgment of law, equivalent to an acquittal, and when a defendant is subsequently placed upon trial before another jury for the same offense he is not thereby twice put in jeopardy. The length of time which is sufficient for proper deliberation upon the part of the jury must, from the necessity of the case, rest in the discretion of the court—a discretion to be exercised in view of all the circumstances of the particular case. *U. S. v. Jim Lee*, (1903) 123 Fed. Rep. 741.

Is a bar when without necessity or consent of defendant.—If a court discharges a jury in a capital or felony case without the consent of the prisoner, and without imperious necessity, such action entitles the prisoner to a final discharge from further trial or prosecution. Upon the discharge of a jury because they were not able to agree, the defendant is entitled to be discharged when the record does not disclose that any cause was assigned for the discharge of the jury, nor does it appear upon the face of the record that the prisoner consented. This case was a discharge on a writ of habeas corpus of a person in the custody of a state court, on the ground that another trial upon the indictment for the same offense would be putting her twice in jeopardy of her liberty in violation of this amendment. *Ex p. Glenn*, (1901) 111 Fed. Rep. 258.

requisite to a fair trial of the issue between the parties, it is within the authority of the court to order the jury to be discharged, and to put the defendant on trial by another jury, and the defendant is not thereby twice put in jeopardy.

Simmons v. U. S., (1891) 142 U. S. 148.

Though neither party has a 'right of challenge after a juror is sworn, it is in the discretion of the court to protect the administration of justice by investigating, at any

stage of the trial, an objection to the impartiality of a jury, and by withdrawing the case from the jury, if any juror is found unfit to sit therein. *U. S. v. Morris*, (1851) 1 Curt. (U. S.) 23, 26 Fed. Cas. No. 15,815.

e. ONE OF JURORS HAD BEEN A GRAND JUROR. — Upon the discharge of a jury on its becoming known to the court while the trial was proceeding, a jury having been sworn and a witness examined, that one of the jury was disqualified, by having been a member of the grand jury that found the indictment, the defendant has not been once put in jeopardy.

Thompson v. U. S., (1894) 155 U. S. 273.

f. INSANITY OF JUROR. — In a capital case insanity of one of the jurors is a good cause for discharging the jury without the consent of the prisoner or his counsel. Such discharge is in the discretion of the court and it cannot form the subject of a plea in bar to the further trial of the prisoner.

U. S. v. Haskell, (1823) 4 Wash. (U. S.) 402, 26 Fed. Cas. No. 15,321, wherein the court said: "The moment it is admitted that in cases of necessity the court is authorized to discharge the jury, the whole argument for applying this article of the Constitution to a discharge of the jury before conviction and judgment is abandoned, because

the exception of necessity is not to be found in any part of the Constitution; and I should consider this court as stepping beyond its duty in interpolating it into that instrument, if the article of the Constitution is applicable to a case of this kind. We admit the exception, but we do it because that article does not apply to a jeopardy short of conviction."

9. Reception of Verdict on Sunday. — The return of a verdict on Sunday and the discharge of the jury are a bar to the further prosecution. When a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday. This has been generally put upon the ground that the reception of a verdict and discharge of the jury is but a ministerial act, involving no judicial discretion; or that it is an act of necessity; and it certainly tends to promote the observance of the day more than would keeping the jury together until Monday.

U. S. v. Ball, (1896) 163 U. S. 662.

10. Acquittal by Court Having No Jurisdiction. — An acquittal before a court having no jurisdiction is, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

U. S. v. Ball, (1896) 163 U. S. 662.

11. Necessity for Judgment on Verdict. — Former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not against the peril of second punishment, but against being again tried for the same offense.

Kepner v. U. S., (1904) 195 U. S. 130.

A verdict of acquittal, although not followed by any judgment, is a bar to any subsequent prosecution for the same offense. U. S. v. Ball, (1896) 163 U. S. 662.

A former conviction cannot be pleaded in bar unless it has been followed by judgment. U. S. v. Herbert, (1836) 5 Cranch (C. C.) 87, 26 Fed. Cas. No. 15,354.

12. Judgment of Conviction Set Aside on Motion of Defendant. — A defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment or upon another indictment for the same offense of which he had been convicted.

U. S. v. Ball, (1896) 163 U. S. 662. See also Robertson v. Baldwin, (1897) 165 U. S. 281; U. S. v. Keen, (1839) 1 McLean (U. S.) 429, 26 Fed. Cas. No. 15,510.

On a motion of the defendant, a verdict of guilty may be set aside and a new trial awarded, and this power may be exercised in capital cases as well as in others. U. S. v. Keen, (1839) 1 McLean (U. S.) 429, 26 Fed. Cas. No. 15,510.

After a conviction in the United States of a capital offense, it is in the discretion of the court to grant a new trial on the application of the prisoner; it being competent for the prisoner himself, by such application, to waive the benefit of that clause in the Constitution which provides that no man shall be put twice in jeopardy of life or limb for the same offense. U. S. v. Harding, (1846) 1 Wall. Jr. (C. C.) 127, 26 Fed. Cas. No. 15,301, in which case the court, commenting on the decision of Story, J., in U. S. v. Gibert, (1834) 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15,204, noted *infra*, said: "I am aware that one of the most eminent of our jurists (Story, J., in U. S. v. Gibert [*supra*]) has found an inhibition in the Constitution against the grant of new trials in cases involving jeopardy of life. But I cannot realize the correctness of the interpretation, which, anxious to secure a citizen against the injustice of a second conviction, requires him to suffer un-

der the injustice of a first. Certainly, I would not subject the prisoner to the hazards of a new trial without his consent. If, being capitally convicted, he elects to undergo the sentence, it may be his right, as it was to have pleaded guilty to the indictment. When, however, he asks a second trial, it is to relieve himself from the jeopardy in which he is already; and it is no new jeopardy that he encounters when his prayer is granted, but the same, divested of the imminent certainty of its fatal issue."

This provision means that no person shall be tried a second time for the same offense after a trial by a competent and regular jury upon a good indictment, whether there be a verdict of acquittal or conviction. Therefore, a new trial in a capital case, after a verdict regularly rendered upon a sufficient indictment, cannot be granted. U. S. v. Gibert, (1834) 2 Sumn. (U. S.) 19, 25 Fed. Cas. No. 15,204; but in a dissenting opinion in Sparf v. U. S., (1895) 156 U. S. 175, Gray, J., said: "Although Mr. Justice Story, in U. S. v. Gibert, (1834) 2 Sumn. (U. S.) 19, thought that a new trial could not be granted to a man convicted of murder by a jury, because to do so would be to put him twice in jeopardy of his life, yet the Circuit Courts of the United States may doubtless grant new trials after conviction, though not after acquittal, in criminal cases tried before them."

13. Motion in Arrest of Judgment Pending. — In order to sustain a plea of former acquittal or of former conviction, it should appear that the former proceedings have been concluded. When a motion in arrest of judgment is still pending, such a plea cannot be sustained.

U. S. v. Martin, (1886) 28 Fed. Rep. 812.

14. Dismissal of Case After Award of New Trial. — When a defendant has been convicted, an appeal taken, and a new trial awarded, the case dismissed and a second bill of indictment found, a plea of former jeopardy will not avail.

U. S. v. Jones, (1887) 31 Fed. Rep. 725.

15. Judgment Arrested for Apparent Defects. — When a judgment is arrested for apparent defects, a plea of former jeopardy cannot be sustained.

U. S. v. Jones, (1887) 31 Fed. Rep. 725.

16. Compliance with One of Alternative Punishments. — Where a law authorizes imprisonment or a fine, and the court, through inadvertence, has imposed both punishments, after the fine is paid the court cannot, during the same term, change its judgment by sentencing the defendant to imprisonment.

Ex p. Lange, (1873) 18 Wall. (U. S.) 175, from being twice punished for the same offense as from being tried for it.
in which case the court said that this clause was designed as much to prevent the criminal

AMENDMENT V.

"Nor shall [any person] be compelled in any criminal case to be a witness against himself."

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I. AFFIRMATION OF PRINCIPLES OF COMMON LAW. — With the adoption of this amendment principles established at the common law became reaffirmed in the Constitution.

U. S. v. Three Tons Coal, (1875) 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515.

II. MUST BE GIVEN A BROAD CONSTRUCTION. — This clause must have a broad construction in favor of the right which it was intended to secure.

Counselman v. Hitchcock, (1892) 142 U. S. 562, *reversing In re Counselman*, (1890) 44 Fed. Rep. 268.

"The clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice." *Brown v. Walker*, (1896) 161 U. S.

596, *affirming* (1895) 70 Fed. Rep. 46. See also *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 45.

This constitutional provision, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the citizen immunity from every kind of self-accusation. A literal construction would deprive it of its efficacy. *In re Nachman*, (1902) 114 Fed. Rep. 996.

III. LIMITATION ON TERRITORIAL LEGISLATURE. — This clause stands as a limitation of the power of the territorial legislature.

Peacock v. Pratt, (C. C. A. 1903) 121 Fed. Rep. 778.

IV. WHO ENTITLED TO PROTECTION — 1. All Persons Summoned as Witnesses.

— It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It is not limited to such cases, but the object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

Counselman v. Hitchcock, (1892) 142 U. S. 562, *reversing In re Counselman*, (1890) 44 Fed. Rep. 268.

The constitutional provision is not directed to defendants, but is a common shield for all persons summoned as witnesses. It is for the protection of witnesses, irrespective of their relation to the proceedings. The Constitution includes persons who are defendants, so far as they belong to the whole class of competent witnesses; but at the time of the adoption of the provision the class known as "defendants" was under disability, and hence could not have been contemplated. It may not be considered that the Constitution intended to protect persons having the status of defend-

ants from giving evidence against themselves, when the law forbade them from being witnesses at all. But when the disability was removed they came within its protection, not because they were defendants, but because they might be witnesses. Moreover, when a defendant is protected by the state statute from being called, and yet offers himself as a witness in his own behalf, he cannot claim the protection of the Constitution as to the charge involved, while, if he be a mere witness, and unrelated as defendant to the proceeding, he may end his evidence whenever it guiltily connects him even with the immediate offense under investigation. *U. S. v. Kimball*, (1902) 117 Fed. Rep. 160. But see *U. S. v. McCarthy*, (1883) 18 Fed. Rep. 89.

2. Aliens. — Aliens while in the United States are entitled to the benefits of constitutional guaranties. Letters taken from Chinese persons, the envelopes being opened by customs officials, cannot be used in evidence against such persons without violating the protection afforded by this clause.

U. S. v. Wong Quong Wong, (1899) 94 Fed. Rep. 832.

V. COMPULSION NOT ALONE PHYSICAL OR MENTAL DURESS. — The compulsion prohibited is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders by those engaged in extorting testimony, but comprehends also that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of means to procure the evidence which it is desired should be extracted from him.

U. S. v. Bell, (1897) 81 Fed. Rep. 837.

VI. "IN ANY CRIMINAL CASE" — 1. In General. — The words "criminal case" must be construed as meaning a case in which punishment for crime is sought to be visited upon the person of the offender, in the ordinary course of a criminal prosecution, in contradistinction to a proceeding *in rem* to effect a forfeiture of the thing to which the offense primarily attaches.

U. S. v. Three Tons Coal, (1875) 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515.

2. Suits for Penalties and Forfeitures. — Suits for penalties and forfeitures incurred by the commission of offenses against the law are of a *quasi*-criminal nature, and are within the reason of criminal proceedings for all the purposes of the Fourth Amendment, and of that provision of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself within the meaning of the Fifth Amendment and is the equivalent of a search and seizure — and an unreasonable search and seizure — within the meaning of the Fourth Amendment.

Boyd v. U. S., (1886) 116 U. S. 634, *reversing* *U. S. v. Boyd*, (1885) 24 Fed. Rep. 690, 692.

An Action to Recover a Penalty for Importing an Alien under Contract to perform labor, in violation of an Act of Congress, though an action civil in form, is criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself.

Lees v. U. S., (1893) 150 U. S. 480.

3. Proceedings in Rem. — A judicial proceeding against certain property for the enforcement of a forfeiture, the ground of the proceeding being alleged violation of the revenue laws, is not a criminal proceeding. The true test is that when a judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offense, and such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature.

U. S. v. Three Tons Coal, (1875) 6 Biss. (U. S.) 379, 28 Fed. Cas. No. 16,515.

VII. CLAIM OF PRIVILEGE AND DUTY OF THE COURT — 1. In General. — A witness cannot avoid answering questions upon his mere statement that his answers to them will tend to criminate him. It is for the judge to decide whether his answers will reasonably have such tendency, or whether it will furnish an element or link in the chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of silence, the court may look at all the circumstances of the case, and determine whether or not there is reasonable ground to apprehend danger to the witness from his being compelled to testify. If the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question.

Foot v. Buchanan, (1902) 113 Fed. Rep. 160. See also *In re Hess*, (1905) 134 Fed. Rep. 113.

The statement of a witness that his answer to a question would criminate him is not conclusive, but it is for the judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. It must appear from the character of the question, and the other facts adduced in the case, that there is some tangible and substantial probability that the answer of the witness may help to convict him of a crime. *Ex p. Irvine*, (1896) 74 Fed. Rep. 960.

It is not sufficient to excuse the witness from answering that he may in his own mind think his answer to the question might by possibility lead to some criminal charge against him, or tend to convict him of it, if made. The court must be able to perceive that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. *U. S. v. McCarthy*, (1883) 18 Fed. Rep. 88.

Claim should be allowed when hazard appears.—The refusal of a bankrupt to answer questions on the ground that the answers would tend to incriminate him should be sustained when the situation is such as seems to put him in any hazard. *In re Shera*, (1902) 114 Fed. Rep. 207. See *In re Franklin Syndicate*, (1900) 114 Fed. Rep. 205.

Presumption favors claim of privilege.—In a case where it clearly appears to the court that a party from whom evidence is sought contumaciously or mistakenly refuses to furnish that which cannot possibly injure him, he will not be permitted to shield himself behind the privilege, but generally the party best knows what he cannot furnish without accusing himself, and where it is not perfectly evident and manifest, that the evi-

dence called for will not be incriminating, the privilege must be allowed. *In re Kanter*, (1902) 117 Fed. Rep. 356.

Effect of oath to support claim of privilege.—It is the province of the court to judge whether any direct answer to the question which may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be; and if he say on oath that he cannot answer without accusing himself, he cannot be compelled to answer. *U. S. v. Burr*, (1807) 25 Fed. Cas. No. 14,692a.

If the question is of such a description that the answer may or may not criminate the witness, he can refuse to answer, but if the court is convinced that the answer to the question cannot by any possibility criminate him, and especially if the witness does not swear that he believes it would, it is the duty of the court to compel him to answer. *In re Levin*, (1904) 131 Fed. Rep. 388.

A witness in a criminal cause will be compelled to answer a question which he says, upon his oath, he cannot answer without disclosing a fact which may be material and important evidence to criminate himself, as participator in the same offense for which the defendant stands indicted; provided the court should be of opinion that no direct answer to the question could furnish evidence against the witness. *U. S. v. Miller*, (1821) 2 Cranch (C. C.) 247, 26 Fed. Cas. No. 15,772.

A writ of habeas corpus to release a witness committed for contempt was refused by the Supreme Court upon the ground that that court had no appellate jurisdiction in criminal causes. *Ex p. Kearney*, (1882) 7 Wheat. (U. S.) 38.

2. Motive of Plea of Privilege.—“It is argued by counsel for the respondent that there was evidence before the trial court to show that the privilege was pleaded in bad faith, merely to save the defendants and not to protect the witnesses from a prosecution of themselves. It is true that in many of the authorities, particularly the English ones already referred to, the question of bad faith is regarded as material in the matter of determining whether a question will subject the witness to prosecution. It is to be noted that in the English cases the judges are interpreting and applying a mere rule of the common law for the protection of witnesses, while we are enforcing a positive constitutional guaranty. Possibly, therefore, they may exercise a greater latitude in denying the privilege than we can. We do not understand any of the American authorities to go so far as to hold that where, from the evidence and the nature of the question, the court can definitely determine that the question, if answered in a particular way, will form a link in the chain of evidence to establish the commission of a crime by the witness, the court should

inquire into the motive of the witness in pleading his privilege. It is only where the criminating effect of the question is doubtful that the motive of the witness may be considered, for in such a case his bad faith would have a tendency to show that his answer would not subject him to the danger of a criminal prosecution or help to prove him guilty of crime."

Ex p. Irvine, (1896) 74 Fed. Rep. 964.

VIII. BEFORE GRAND JURY.— It is entirely consistent with the language of this article that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury. The provisions of the Sixth Amendment distinctly mean a criminal prosecution against a person who is accused and who is to be tried by a petit jury, but a criminal prosecution under that article is much narrower than a "criminal case" under this article.

Counselman v. Hitchcock, (1892) 142 U. S. 563, reversing *In re Counselman*, (1890) 44 Fed. Rep. 268.

A witness is not bound to answer, before the grand jury, a question, the answer to which might implicate himself, and he is the sole judge whether it will. The court is to decide whether the answer could implicate the

witness. *Sanderson's Case*, (1829) 3 Cranch (C. C.) 638, 21 Fed. Cas. No. 12,297. But see *Devaughn's Case*, (1824) 2 Cranch (C. C.) 501, 7 Fed. Cas. No. 3,837, wherein it was held that a witness before the grand jury is bound to answer a question, although he makes oath that he cannot answer it without criminating himself.

It is fatal to an indictment that the defendant was called to testify before the grand jury in the particular matter from which it resulted, without being informed or knowing that his own conduct was the subject under investigation.

U. S. v. Edgerton, (1897) 80 Fed. Rep. 374.

IX. RIGHT TO BE INFORMED OF PRIVILEGE.— In an examination before a pension examiner, unless a witness manifestly ignorant of his privilege is informed of it by the examiner, so that he may protect himself, consult counsel if he desires, and assert his right to remain silent, the examination cannot be used in evidence against him, even on an indictment for false swearing in the progress of the examination itself. The examiner must do what the courts generally, if not always, do, in examining a witness in danger of incriminating himself—warn him of the danger, and advise him of his constitutional privilege.

U. S. v. Bell, (1897) 81 Fed. Rep. 853.

X. PRIVILEGE CANNOT BE INVOKED BY COUNSEL.— The privilege is personal and cannot be invoked by counsel.

In re Knickerbocker Steamboat Co., (1905) 136 Fed. Rep. 958, approving the principle stated in *Abbott's Trial Evidence*, pp. 783, 784: "Where the privilege exists, it is personal to the witness. His counsel cannot be

heard to object. * * * The witness has a right to advise with his counsel in the hearing of the court, but not privately, but must give his own answer without aid in writing or otherwise."

XI. ABSOLUTE IMMUNITY MUST BE GIVEN — 1. **In General.**— No statute which leaves the party or witness subject to prosecution after he answers a criminal question put to him can have the effect of supplanting the privilege conferred by this provision. In view of the provision, a statutory enactment, to be

valid, must afford absolute immunity against future prosecution for the offense to which the question relates.

Counselman v. Hitchcock, (1892) 142 U. S. 585, reversing *In re Counselman*, (1890) 44 Fed. Rep. 268.

To allow an inquisitorial, self-incriminating examination to take place the witness must be exempted absolutely from all prosecution, not

only for offenses *aliunde* the testimony he is then giving, but that testimony cannot be made the basis of a prosecution against him, and it is manifest that the immunity of the Constitution cannot comprehend full protection unless this be so. *U. S. v. Bell*, (1897) 81 Fed. Rep. 843.

2. Assurance by the Court of Immunity.—An assurance by the court that no information given by a person in his answers to the questions would or could be used against him in any prosecution in any court of the United States is not sufficient. He cannot be required to waive his constitutional privilege upon such an assurance by the court, but has the right to stand upon his constitutional privilege notwithstanding such assurance and to remain silent whenever any question is asked the answer to which may tend to criminate him.

Foot v. Buchanan, (1902) 113 Fed. Rep. 161.

3. Protection Against Prosecution in State Courts.—A witness under examination before a referee in bankruptcy cannot be compelled to answer a question the answer to which he claims will criminate him. No Act of Congress can deprive a citizen of the privilege afforded by the Constitution unless it supplies a complete protection from all perils against which the Constitution was intended to provide. The provision in the Bankruptcy Act that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" can have no other effect than to protect him against the use of his testimony in any prosecution in the courts of the United States and would be no answer to a prosecution which might be instituted in state courts, which are not created by the Acts of Congress, and which prescribe their own rules or proceeding independently of Congress, and would therefore not provide complete protection.

In re Nachman, (1902) 114 Fed. Rep. 996.

4. Grant of Immunity in Particular Statutes—*a.* SECTION 860, R. S. — Section 860, R. S., providing that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture, provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. But it could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a

criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. Such protection is not coextensive with the constitutional provision.

Counselman v. Hitchcock, (1892) 142 U. S. 560. See also *La Bourgogne*, (1900) 104 Fed. Rep. 823; *U. S. v. Bell*, (1897) 81 Fed. Rep. 830; *Ex p. Irvine*, (1896) 74 Fed. Rep.

964. But see *U. S. v. Brown*, (1871) 1 Sawy. (U. S.) 531, 24 Fed. Cas. No. 14,671; *In re Phillips*, (1869) 10 Int. Rev. Rec. 107, 19 Fed. Cas. No. 11,097.

b. **BANKRUPTCY ACT OF 1898.**—Under this clause, where a person is under examination before a referee in bankruptcy he is not obliged to answer questions when he states that his answers might tend to criminate him; and this is true notwithstanding a section of the Bankrupt Act provides that “no testimony given by him shall be offered in evidence against him in any criminal proceeding.”

In re Rosser, (1899) 96 Fed. Rep. 305. See also *In re Shera*, (1902) 114 Fed. Rep. 207; *In re Walsh*, (1900) 104 Fed. Rep. 518; *In re Scott*, (1899) 95 Fed. Rep. 815; *In re Feldstein*, (1900) 103 Fed. Rep. 269. But in *Mackel v. Rochester*, (C. C. A. 1900) 102 Fed. Rep. 317, the court said: “The testimony which he may be compelled to give includes any matter within his knowledge which is relevant to the transaction under investigation and material to its determination. If, in giving such testimony, he exposes himself to prosecution and penalty, he is within the protection of the statute, and upon any such prosecution is authorized to plead as a bar thereof that under the compulsion of this section he gave the criminating testimony.” And see *In re Franklin Syndicate*, (1900) 114 Fed. Rep. 205.

When the situation is such as seems to put him in any hazard, the bankrupt can avail himself of the privilege of refusing to incriminate himself. *In re Shera*, (1902) 114 Fed. Rep. 207.

Under an Act of Congress relating to bankruptcy, a bankrupt cannot be compelled to produce his books and papers, when he alleges, and it does not clearly appear to the contrary, that the schedules, books, etc., would be competent and relevant evidence against him on the trial of an indictment pending in a state court, charging him with the crime of fraudulently removing, secreting, and disposing of property and with the crime of grand larceny in the first degree in obtain-

ing goods upon false pretenses. *In re Kanter*, (1902) 117 Fed. Rep. 356.

Examination of books and papers to test claim of privilege.—Where a bankrupt pleads this privilege, he should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and, when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates. *In re Hess*, (1905) 134 Fed. Rep. 113. See also *In re Hark*, (1905) 136 Fed. Rep. 986.

When witnesses testify that an examination of the books shows nothing in them tending to incriminate the bankrupt, and that the books were properly and carefully kept, the bankrupt may be compelled to produce them before the referee. *In re Hess*, (1905) 136 Fed. Rep. 988.

A trustee charged by a referee with misappropriating funds of the estate, through alteration of checks after they had been countersigned by the referee, may decline to answer a question the answer to which might tend to criminate him. The Bankruptcy Act affords no immunity excepting with reference to the testimony of a bankrupt. *In re Smith*, (1902) 112 Fed. Rep. 509.

c. **INTERSTATE COMMERCE COMMISSION ACT.**—An Act of Congress which provides that “no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements, and documents before the interstate commerce commission, or in obedience to the subpoena of the commission, * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture; but no person shall be prose-

cuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding," is not incompatible with this clause.

Brown v. Walker, (1896) 161 U. S. 593, by a bare majority of the court, wherein the court said: "Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for, or in aid of, a

criminal prosecution against the witness, the rule ceases to apply, its object being to protect the witness himself and no one else—much less that it shall be made use of as a pretext for securing immunity to others." *Affirming* (1895) 70 Fed. Rep. 46. See also *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 45. But see *U. S. v. James*, (1894) 60 Fed. Rep. 257.

XII. WHEN MAY NOT BE COMPELLED TO TESTIFY — 1. Evidence May Be Used Not Only in Pending but in Future Prosecutions.—The fact that no prosecution is now pending against the bankrupt is no answer to his right to claim this constitutional privilege. The meaning of the constitutional provision is not simply that he shall not be compelled to produce books and papers which may contain evidence tending to incriminate him in a pending prosecution for a criminal offense against him, but its object is to insure him against such compulsory production of his books and papers containing incriminating evidence in any proceeding or investigation, whether such compulsory disclosure is sought directly to establish his guilt, or indirectly and incidentally for the purpose of proving facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending or that might be brought against him thereafter, such disclosure would be an accusation of himself, within the meaning of the constitutional provision.

In re Hess, (1905) 134 Fed. Rep. 109.

2. Testimony Leading to Other Information.—A person cannot be compelled to disclose facts before a court or a grand jury which might subject him to a criminal prosecution or his property to forfeiture, though a statute declares that no evidence obtained from him shall be given in evidence, or in any manner used against him or his property or estate in any court of the United States in any criminal proceedings or for the enforcement of any penalty or forfeiture. While such a statute would protect him from the use of his testimony against him or his property, in any prosecution against him or his property, it could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in a court of the United States.

Counselman v. Hitchcock, (1892) 142 U. S. 564, reversing *In re Counselman*, (1890) 44 Fed. Rep. 268.

That although answers cannot themselves be used against the witness, they may never-

theless point to other information not otherwise to be obtained, which, when obtained, may be used, and successfully used, against him, is not a valid ground of objection. *In re Phillips*, (1869) 10 Int. Rev. Rec. 107, 19 Fed. Cas. No. 11,097.

3. Requiring Production of Private Books and Papers—*a. IN GENERAL.* — The Act of June 22, 1874, so far as it authorizes an order requiring the production of books and papers in actions for penalties and forfeitures, violates this clause.

Boyd v. U. S., (1886) 116 U.S. 633, wherein the court said that there is an intimate relation between the Fourth and Fifth Amendments. "They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Reversing U. S. v. Boyd*, (1885) 24 Fed. Rep. 690, 692. See also *Blum v. State*, (1902) 94 Md. 382.

But see *U. S. v. Distillery*, No. Twenty-Eight, (1875) 6 Biss. (U. S.) 483, 25 Fed. Cas. No. 14,966, wherein it was held that an order under the fifth section of the Act of June 22, 1874, providing for the production of books, papers, etc., "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States," was not unconstitutional under this clause, as such a proceeding was entirely independent of any criminal prosecutions and the books and papers could only be used in the particular action.

Papers deposited in a bank. — The president of an insolvent bank brought a bill against the receiver to obtain possession of a trunk alleged to contain private papers. The bill alleged that the plaintiff deposited in the vaults of the bank certain private and personal books, papers, and other documents, which were never the property of the bank, and that some of the papers were then in a trunk, to which he held the key; that the trunk was in the vault when the bank was closed by order of the comptroller, and that the receiver had since held it, and refused to pass it to the plaintiff; that the papers were personal in their nature, and necessary to a settlement of his business affairs; that he was charged with violations of the law, and that the government attorney was about

to issue a summons calling the defendant before the grand jury with the papers in question; that he was without adequate remedy at law, and therefore sought the interposition of a court of equity. The evidence of the cashier tended to show that the trunk in question was kept in the bank and not elsewhere, as the private trunk of the plaintiff, but witness had no knowledge of the contents. As the plaintiff asked for affirmative relief, and from the character of the possession it was considered that the court should know, in a general way, what the trunk contained, an order was made appointing a master, and, after examination by the master of the contents of the trunk in the presence of no one, such papers as were the property of the bank, and not material to the issue suggested by the district attorney, were to be delivered to the receiver; such as were private, and were not the property of the bank, together with such as were material to be introduced by the plaintiff on his own behalf, were to be delivered to the plaintiff; and such as were not included in those two classes, and in the judgment of the master were or might be material to the issue suggested by the district attorney, were to be sealed and held for further orders. *Potter v. Beal*, (1892) 49 Fed. Rep. 793.

When United States has an interest. — An Act of Congress authorizing a supervisor of internal revenue to compel banks to permit an inspection of their books and papers connected with a public business, in which the United States has an interest in the collection of revenue, is constitutional. *Stanwood v. Green*, (1870) 2 Abb. (U. S.) 184, 22 Fed. Cas. No. 13,301.

A proceeding under a revenue act to compel a person to produce his books for examination by an assessor is a civil and not a criminal proceeding, and does not infringe this clause, and if the disclosures might tend to criminate him, the objection has no force when an existing statute provides that disclosures and evidence obtained by means of any judicial proceeding from any party or witness shall not be used against him in any manner before any court of the United States or any officer thereof. *In re Strouse*, (1871) 1 Sawy. (U. S.) 605, 23 Fed. Cas. No. 13,548. But see *supra*, p. 282, *Grant of Immunity in Particular Statutes — Section 860, R. S.*

b. CALLING FOR INCRIMINATING DOCUMENT IN PRESENCE OF JURY. — Calling upon a defendant in the presence of the jury, by direction of the court, to produce a document which would have been self-incriminating, was an infraction of his constitutional rights within the meaning of this amendment.

McKnight v. U. S., (C. C. A, 1902) 115 Fed. Rep. 981.

4. A Proper Question in a Series Having Tendency to Criminate. — When there is a series of questions, one who is under commitment for refusal to answer all

cannot be denied relief because one of them did not call for a criminating answer. If it is one step having a tendency to criminate him, he is not compelled to answer.

Foot v. Buchanan, (1902) 113 Fed. Rep. 161.

5. Examination of Officer Charged with Misconduct. — An inquisitorial examination, under oath, of an officer charged with misconduct, whether amounting to an indictable offense or only to his discredit as such officer, infringes the spirit, if not the letter, of this amendment.

U. S. v. Collins, (1873) 1 Woods (U. S.) 499, 25 Fed. Cas. No. 14,837.

6. Requiring Oath of Loyalty. — The Act of Congress of Jan. 24, 1865, prescribing an oath to be taken before any person could be admitted as an attorney and counselor at the bar of any of the courts of the United States, that the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority, or pretended authority, in hostility to the United States; that he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and that he will support and defend the Constitution of the United States against all enemies, foreign or domestic, and will bear true faith and allegiance to the same, was held to be void, as it compelled such person to be a witness against himself.

In re Shorter, (1865) 22 Fed. Cas. No. 12,811. See also *Matter of Baxter*, (1866) 5 Am. L. Reg. N. S. 159, 2 Fed. Cas. No. 1,118.

XIII. WHEN MAY BE COMPELLED TO TESTIFY — 1. **Prosecution Barred.** — This clause does not impair the obligation of a witness to testify if a prosecution against him be barred by the lapse of time, a pardon, or by the statutory enactment.

Robertson v. Baldwin, (1897) 165 U. S. 281, *citing* *Brown v. Walker*, (1896) 161 U. S. 591.

2. Testimony Tending to Degrade. — That testimony may tend to degrade a witness in public estimation does not exempt him from the duty of disclosure, if the purposed testimony is material to the issue on trial. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time

operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other.

Brown v. Walker, (1896) 161 U. S. 605, *affirming* (1895) 70 Fed. Rep. 46. See also *Mackel v. Rochester*, (C. C. A. 1900) 102 Fed. Rep. 314.

3. Cross-examination. — A bankrupt cannot claim the protection of the constitutional privilege in case a question is clearly cross-examination of what he had volunteered himself, either in his petition and schedules, or any testimony he had already given.

In re Walsh, (1900) 104 Fed. Rep. 518.

If the witness elects to waive his privilege, as he may doubtless do, since the privilege is for his protection and not for that of other

parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. *Brown v. Walker*, (1896) 161 U. S. 597.

XIV. LIABILITY FOR PERJURY ON WAIVER OF PRIVILEGE. — If a citizen fully cognizant of his privilege abandons it under compulsion or otherwise, and essays to speak under oath before an authorized officer, he must speak the truth, and may be prosecuted for perjury if he does not. Before that principle can be invoked, it must appear, as it must appear in all cases of abandonment and waiver of rights, that the abandonment was knowingly and understandingly made, and that no undue advantage was taken of the ignorance of the victim of inquisitorial investigation in the process of his examination.

U. S. v. Bell, (1897) 81 Fed. Rep. 840.

AMENDMENT V.

"Nor [shall any person] be deprived of life, liberty, or property, without due process of law."¹

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I. NOT A LIMITATION ON THE STATES.— The process which is meant in this clause is federal process.

In re Mahon, (1888) 34 Fed. Rep. 530.

That this amendment is not a limitation on the powers of the states, see also *supra*, p. 256.

II. AFFIRMATION OF PRINCIPLES OF COMMON LAW.— This amendment only announces and reaffirms the ancient principles of the common law, and prevents them from being unjustly invaded by the power of the federal government.

North Carolina v. Vanderford, (1888) 35 Fed. Rep. 282.

III. RESTRAINT ON EXECUTIVE, LEGISLATIVE, AND JUDICIAL DEPARTMENTS.— The Judicial Department of the government is necessarily governed in the exercise of its functions by the rule of due process of law.

Hovey v. Elliott, (1897) 167 U. S. 409.

The Article is a Restraint on the Legislative as Well as on the Executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will.

Murray v. Hoboken Land, etc., Co., (1855) 18 How. (U. S.) 277.

IV. APPLICATION TO DISTRICT OF COLUMBIA.— All the guaranties of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as those residing in the several states.

Lappin v. District of Columbia, (1903) 22 App. Cas. (D. C.) 76.

V. OPERATION IN ACQUIRED TERRITORY. — The provision in the resolution annexing the Hawaiian Islands that the municipal legislation not “contrary to the Constitution of the United States” should remain in force, was not intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common-law proceedings by grand and petit jury, and there may be a conviction for manslaughter by a verdict of nine out of twelve jurors.

Hawaii v. Mankichi, (1903) 190 U. S. 197.

VI. APPLICATION TO CORPORATIONS. — From the nature of the prohibitions in this amendment it would seem, with the exception of the last clause, as though they would only apply to natural persons. No others can be witnesses; no others can be twice put in jeopardy of life or limb, or compelled to be witnesses against themselves; and therefore it might be said with much force that the word “person,” there used in connection with the prohibition against the deprivation of life, liberty, and property without due process of law, is in like manner limited to a natural person. But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.

Railroad Tax Cases, (1882) 13 Fed. Rep. 746. See also *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 389, *affirmed* on other grounds (1886) 118 U. S. 394.

This amendment contains a prohibition upon the government of the United States, similar to the one in the Fourteenth Amendment against the action of the states, de-

claring that no person shall be deprived of life, liberty, or property, without due process of law; and it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals. *San Mateo County v. Southern Pac. R. Co.*, (1892) 18 Fed. Rep. 151.

VII. WHAT CONSTITUTES DUE PROCESS OF LAW — 1. In General. — Due process of law in this clause refers to that law of the land which derives its authority from the legislative power conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.

Hurtado v. California, (1884) 110 U. S. 535.

Cooley's definition. — “Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.” *Cooley on Constitutional Limitations*, p. 434 (8th ed. 1890).

“The words ‘due process of law’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in

Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the Ohio river, used the same words. The Constitution of the United States, as adopted, contained the provision that ‘the trial of all crimes, except in cases of impeachment, shall

be by jury.' When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions and in the ordinance of 1787, the words of Magna Charta, and declared that no person shall be deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, 'law of the land,' without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on Magna Charta had declared to be the true meaning of the phrase, 'law of the land,' in that instrument, and which were undoubtedly then received as their true meaning." *Murray v. Hoboken Land, etc., Co.*, (1855) 18 How. (U. S.) 276.

"As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive

justice." *Columbia Bank v. Okely*, (1819) 4 Wheat. (U. S.) 244.

"Due process of law" and the "law of the land" differentiate themselves as they are applied to different conditions and different subject-matters. *Jaeger v. U. S.*, (1892) 27 Ct. Cl. 285.

In judicial proceedings due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial. *Burton v. Platter*, (C. C. A. 1893) 53 Fed. Rep. 904.

Due process of law in a criminal case means compliance by the government with the fundamental requisite, such as that the party shall be charged with the crime in the way provided by the Constitution and laws of the United States. Liberty, under such Constitution and laws, is an inalienable prerogative, of which no man, by means of mere agreement, can divest himself. Any divestiture not occurring by due process of law is null. *Ex p. McCluskey*, (1889) 40 Fed. Rep. 74.

2. Not Necessarily a Proceeding in a Court of Justice.—The words "due process of law" do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.

Davidson v. New Orleans, (1877) 96 U. S. 102.

Due process of law does not require the interference of the judicial power. *Public Clearing House v. Coyne*, (1904) 194 U. S. 508.

3. Trial by Jury Not Essential to "Due Process."—Due process of law does not require a plenary suit and a trial by jury in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.

Ex p. Wall, (1882) 107 U. S. 289.

Due process of law carries with it the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of cases through courts

of justice to which the one in question belongs. That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the Constitution was adopted. It does

not give the right of trial by jury in cases in which it did not exist at that time. It does not give it in the large fields of equitable and admiralty jurisdiction. It does not take away from the courts the power to punish contempts summarily, without the intervention of a jury, as it existed at the time of the adoption of the Constitution. *Light v. Canadian County Bank*, (1894) 2 Okla. 551.

Equity jurisdiction without right of trial by jury.—The judicial authority of the territory of Oklahoma was originally derived from the organic act, which provided that the judicial power of the territory "shall be vested in a Supreme Court, District Courts, Probate Courts, and justices of the peace,

* * * and said Supreme and District Courts, respectively, shall possess chancery, as well as common-law jurisdiction, and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the territory, affecting persons or property." The equitable and common-law jurisdiction thus granted was a part of that "due process of law" which is guaranteed to every citizen of this country as a protection of his life, liberty, and property, and the jurisdiction of these courts and judges in equity as provided in the organic act is as much due process of law as is the right of trial by jury in cases at the common law. *Smith v. Speed*, (1901) 11 Okla. 95.

4. Method of Impaneling Jury.—Though a court does not exceed its jurisdiction in directing the impaneling of a jury by a method different from that prescribed by the state statute, yet in so doing all rules of practice must necessarily be adapted to secure the rights of the accused; that is, where there is no statute, the practice must not conflict with or abridge the right as it exists at common law.

Lewis v. U. S., (1892) 146 U. S. 377.

5. Summary Process.—Due process of law does not necessarily imply a trial by jury, or even a trial before a court organized according to common-law forms, and proceeding according to common-law methods. That is due process of law which is according to the method of legal proceedings employed in similar cases. There is a great variety of special cases in which, on account of the necessity of prompt action, and because the regular course of proceedings in a court of justice by jury trial would involve delay, and contravene the object sought to be attained by the proceeding, it has always been customary to adopt a summary method. That is one of the principal reasons for the adoption of such proceedings. If the process is customary, it is that which is due.

In re Sing Lee, (1893) 54 Fed. Rep. 336. See also *infra*, *Right to practice law*, as to a summary proceeding against an attorney to

exclude him from the practice of his profession, p. 304.

6. Trial by Election Board for Violation of Election Law.—A judge of election, or a board of election officers constituted under state laws, is not such a judicial tribunal as would give to one charged with an offense against the election law a trial according to the law of the land or due process of law.

Huber v. Reily, (1866) 53 Pa. St. 117, wherein the court said: "The spirit of these constitutional provisions is briefly that no person can be made to suffer for a criminal offense unless the penalty be inflicted by due process of law. What that is, has been often defined, but never better than it was, both historically and critically, by Judge Curtis, of the Supreme Court of the United States, in *Den v. Hoboken Land, etc., Co.*, (1855) 18

How. (U. S.) 272. It ordinarily implies and includes a complainant, a defendant, and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. It must be admitted there are a few exceptional cases. Prominent among these are summary proceedings to recover debts due to the government, especially taxes and sums due by defaulting public officers."

7. Preliminary Hearing in Ejectment.—A Cherokee statute under which a defendant in ejectment is entitled to show cause before the clerk why the

writ should not issue, and the hearing before the clerk is preliminary and interlocutory, but is a hearing that determines the question whether the writ shall issue before the final trial of the cause upon its merits in the District Court, provides due process of law.

Mehlin v. Ice, (C. C. A. 1893) 56 Fed. Rep. 16.

8. Necessity of Notice and Opportunity to Be Heard. (See also generally throughout the notes on this clause.)—*a. NOTICE AND OPPORTUNITY TO BE HEARD IN ASSESSMENTS FOR LOCAL IMPROVEMENTS*—(1) *In General.*—In the matter of the necessity of notice and an opportunity to be heard on levying an assessment for local improvements there is a wide difference between a tax or assessment prescribed by a legislative body having full authority over a subject and one imposed by a municipal corporation acting under a limited and delegated authority. An Act of Congress having provided that assessments levied for laying water mains in the District of Columbia should be at a certain rate per lineal foot against all lands abutting upon the street in which the water main should be laid, such Act was held conclusive alike of the question of the necessity of the work and of the benefits as against abutting property. Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard.

Parsons v. District of Columbia, (1898) 170 U. S. 52. See also *Allman v. District of Columbia*, (1894) 3 App. Cas. (D. C.) 24.

See *infra*, *Deprivation of Property—Assessments for Local Improvements*, p. 299.

(2) *Notice by Publication.*—In proceedings for the assessment of special taxes for local improvements, notice by publication is sufficient.

Wight v. Davidson, (1901) 181 U. S. 382, *reversing Davidson v. Wight*, (1900) 16 App. Cas. (D. C.) 371.

b. JUDGMENT AGAINST SURETIES WITHOUT NOTICE.—In an action to recover the possession of personal property wrongfully detained, in which the defendant gave a cross bond to obtain a return to him of the property replevied, and the only question at issue was as to who was entitled to the possession of the property at the commencement of the action, no cause of action on the bond having been pleaded or recovery upon it asked, a judgment on the bond was in effect depriving the sureties of property without due process of law, no notice of the ground on which the judgment was to be rendered and no opportunity to contest their execution of the bond or their liability upon it having been given to them. In many jurisdictions there are statutory provisions authorizing judgments against sureties where a recovery has been had against their principal by summary proceedings, but even in such cases the method prescribed by the statute must be strictly followed.

Burton v. Platter, (C. C. A. 1893) 53 Fed. Rep. 905.

c. VOLUNTARY PROCEEDINGS IN BANKRUPTCY WITHOUT NOTICE TO CREDITORS. — The provision in the Bankruptcy Act as to voluntary proceedings are not in violation of this amendment, as depriving creditors of their property without due process of law, in failing to provide for notice. Proceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*, and if such notice to those who may be interested in opposing discharge, as the nature of the proceeding admits, is provided to be given, that is sufficient.

Hanover Nat. Bank v. Moyses, (1902) 186 U. S. 190.

d. ORDER IN BANKRUPTCY WITHOUT NOTICE. — A bankrupt was committed to jail for contempt of court, in that he failed to obey the order of a referee to turn over to the trustee a certain sum alleged to have been part of his estate when he was adjudged a bankrupt, and to have been in his possession when the order for him to deliver it to the trustee was made. No notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the amount in controversy, before the order to that effect was made. No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded him to be heard upon the questions it presented. He was cited to appear and be examined under section 21 of the Bankrupt Act, and his testimony and that of various other witnesses were taken before the referee upon that citation, but no notice was served upon him that the claim, which culminated in the order for the payment of the money, was made or was in issue at that examination, or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. It was held that such a proceeding lacked every element of due process of law.

In re Rosser, (C. C. A. 1900) 101 Fed. Rep. 587, wherein the court said: "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from

the court if the claim is sustained. And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained."

e. APPOINTMENT OF RECEIVER IN BANKRUPTCY WITHOUT NOTICE. — The appointment of a receiver upon an involuntary petition in bankruptcy without first giving notice to any of the bankrupts does not deprive the bankrupts of their property without due process of law, but is merely a preliminary step in a proceeding whereby property is taken into custody and safely preserved until the rights of the contending parties can be determined.

In re Francis, (1905) 136 Fed. Rep. 914, wherein the court said: "We find in all systems of procedure similar means of enforcing rights of parties and preserving property — such as the issuance of the writ of replevin, whereby the possession of property is taken by the claimant from an adverse party with-

out notice; and in admiralty libels are filed and vessels attached; and in foreign attachments personal property is seized without notice — and in all these proceedings the object is to hold the property safely until the issues involved can be determined. They are all instituted without notice."

f. CONCLUSIVENESS OF ASSESSMENT AGAINST STOCKHOLDERS OF BANK. — An action at law brought by a receiver of a bank to recover from the defendants, as stockholders, the amount of an assessment made by the comptroller of the currency of the United States under a statute which makes the assessment made by the comptroller conclusive upon the stockholders, does not deprive them of due process of law.

Young v. Wempe, (1891) 46 Fed. Rep. 354.

g. RIGHT TO BE HEARD IN PROCEEDINGS BY AGENTS OF THE GOVERNMENT. — Due process of law is not denied when an opportunity is not given to be heard on questions to be settled, not by a judicial proceeding, but by the action of the agents of the government.

Buttfield v. Stranahan, (1904) 192 U. S. 497.

VIII. DEPRIVATION OF LIFE AND LIBERTY — 1. Illegal Grand Jury. — A person convicted and sentenced to imprisonment for larceny upon an indictment found by a grand jury impaneled without authority of law, would be illegally convicted and sentenced, and therefore restrained of his liberty without due process of law.

Ex p. Farley, (1889) 40 Fed. Rep. 67.

2. Arrest and Detention by Order of War Department. — An arrest and detention under an order of the war department, entitled "Persons discouraging enlistments to be arrested," was held to be in direct violation of this clause.

Ex p. Field, (1862) 5 Blatchf. (U. S.) 63, 9 Fed. Cas. No. 4,761.

3. Personal Presence of Defendant During Trial. — A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial.

Lewis v. U. S., (1892) 146 U. S. 372.

It is the right of one whose life or property is involved in a prosecution for felony to be personally present at the trial; that is, at every stage of the trial when his substan-

tial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution. *Hopt v. Utah*, (1884) 110 U. S. 579.

4. Arrest and Bail in Civil Action. — The arrest of a party under the provisions of the Oklahoma Code of Civil Procedure was held not to be a deprivation of liberty without due process of law.

Light v. Canadian County Bank, (1894) 2 Okla. 552, on which point the court said: "The guarantees relied upon by the plaintiff

in error are interpreted by the great preponderance of authority in the courts, as leaving the rights of creditors and debtors unim-

paired. As the right to compel the production and delivery of property or money not exempt from execution, found in the ownership or control of the debtor at the time of execution levied, by arrest and imprisonment, existed at the time of the adoption of the Constitution, so it exists now under the proceed-

ings in this case. It is now and was then a method of coercion adopted against the debtor who wilfully disobeys the order of the court. It is no greater and no less, but the same 'due process of law' guaranteed by the Constitution."

5. Deportation of Aliens — a. IN GENERAL. — The deportation of an anarchist alien, who is found to be here in violation of law, is not a deprivation of liberty without due process of law.

U. S. v. Williams, (1904) 194 U. S. 290.

See also *Admission and Exclusion of Aliens*, 8 FED. STAT. ANNOT. 420.

To another country than that from which

he came. — It would not seem to be due process of law for punishing an alien coming to the United States from one country, by banishment from this to another country. *In re Mah Wong Gee*, (1891) 47 Fed. Rep. 433.

b. EXECUTIVE OFFICERS MAY DETERMINE THE RIGHT TO ENTER. — Intrusting to an executive officer the decision of the question of the right of a person to enter the United States does not deprive a person of liberty without due process of law.

U. S. v. Ju Toy, (1905) 198 U. S. 263, wherein the court said: "If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, 660, and in *Fong Yue Ting v. U. S.*, (1893) 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Den v. Hoboken Land, etc., Co.*, (1855) 18 How. (U. S.) 272, 280, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing v. U. S.*, (1895) 158 U. S. 538, 546, 547; *Japanese Immigrant Case*, (1903) 189 U. S. 86, 100; *Public Clearing House v. Coyne*, (1904) 194 U. S. 497, 508, 509."

Congress may confer upon any inferior officer of the government, especially those appointed by the department of commerce and labor which has power to regulate the coming of all persons into the United States, plenary power to determine the various facts upon which citizenship depends, so far as they relate to persons applying for admission into the United States, and may provide for an appeal to be taken to the secretary of commerce and labor, whose decision shall be final. If no appeal is taken, then the determination of the inferior officer is, of course, final. Under such a statute, such persons are not deprived of their liberty without due process of law, for they have a competent tribunal in which to be heard, a hearing with opportunity

to present their evidence, a judgment or determination, and the right of appeal, all according to the law of the land. *In re Sing Tuck*, (1903) 126 Fed. Rep. 398.

The power to exclude or expel aliens belongs to the political department of the government, and the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country or remain in it depends, is due process of law; but the administrative officers, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles that inhere in "due process of law," one of which is that no person shall be deprived of his liberty without opportunity, at some time, to be heard before such officers in respect to the matters upon which that liberty depends. *The Japanese Immigrant Case*, (1903) 189 U. S. 101.

As to aliens who have never gained a foothold upon the soil of this country, the inquiry and decision which officers of the executive branch of the government may make in the due course of administration of the immigration laws is due process of law. *Nishimura Ekiu v. U. S.*, (1892) 142 U. S. 651, wherein the court said: "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

But see, as to alien residents, *In re Yamasaka*, (1899) 95 Fed. Rep. 655, wherein the court said, *obiter*, that alien residents cannot

be arrested by ministerial officers of the United States, and expelled from this country. The guaranty of personal liberty in this amendment does not distinguish between citi-

zens and aliens, but lays down the broad principle that no person shall be deprived of life, liberty, or property without due process of law.

c. PUTTING BURDEN OF PROOF OF RIGHT TO REMAIN ON ALIEN. — The Act of Congress of May 5, 1892, section 3, providing "that any Chinese person or person of Chinese descent arrested under the provisions of this Act or the Acts hereby extended shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States," was held to be valid as being within the power of a legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.

Li Sing v. U. S., (1901) 180 U. S. 493. Fed. Rep. 334. But see *U. S. v. Long Hop*, See also *U. S. v. Wong Dep Ken*, (1893) 57 (1892) 55 Fed. Rep. 62; *In re Mah Wong* Fed. Rep. 206; *In re Sing Lee*, (1893) 54 Gee, (1891) 47 Fed. Rep. 433.

d. IMPRISONMENT AT HARD LABOR BEFORE EXPULSION. — The provision in the Chinese Exclusion Act providing for imprisonment at hard labor, to be undergone before the sentence of deportation is carried into effect, and that such imprisonment was to be adjudged against the accused by a justice, judge, or commissioner, upon a summary hearing, was held to be unconstitutional.

Wong Wing v. U. S., (1896) 163 U. S. 235. Rep. 211; *In re Ah Yuk*, (1893) 53 Fed. Rep. See also *Li Sing v. U. S.*, (1901) 180 U. S. 495; *U. S. v. Wong Dep Ken*, (1893) 57 Fed. 781.

6. Commitment of Minor to Reformatory. — Commitment to a reform school of a young girl, known to have perversely exposed herself to immoral habits and influences, made upon the application of her father, is not in the nature of a prosecution, conviction, and punishment for crime. The proceedings had upon such an application were but the methods prescribed by law for the permitted transfer of guardianship of the person, and for the protection of the state from imposition.

Rule v. Geddes, (1904) 23 App. Cas. (D. C.) 48.

7. Contracts in Violation of the Constitution. — The scope of the provision regarding the liberty of the citizen cannot be so enlarged as to hold that it includes, or was intended to include, a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

Addyston Pipe, etc., Co. v. U. S., (1899) 175 U. S. 229, *modifying* *U. S. v. Addyston Pipe, etc., Co.*, (C. C. A. 1898) 85 Fed. Rep. 271.

8. Regulating Contracts of Seamen. — An Act of Congress making it unlawful to pay any seaman wages in advance, making such payment a misdemeanor, and in terms providing that such payment shall not absolve the vessel or its master or owner for full payment of wages after the same shall have been actually earned, is not invalid as invading the liberty of contract which is guaranteed by this amendment. Contracts with sailors for their services are

exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce.

Patterson v. Bark Eudora, (1903) 190 U. S. 173. See also *Kenney v. Blake*, (C. C. A. 1903) 125 Fed. Rep. 672, affirming *The Troop*, (1902) 117 Fed. Rep. 557.

9. Limiting Compensation of Pension Agents and Attorneys. — The Act of Congress of June 27, 1890, section 4, providing "that no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of this Act shall, directly or indirectly, contract for, demand, receive, or retain for such services in preparing, presenting, or prosecuting such claim a sum greater than ten dollars, which sum shall be payable only upon the order of the commissioner of pensions, by the pension agent making payment of the pension allowed, and any person who shall violate any of the provisions of this section, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant under this Act, shall be deemed guilty of a misdemeanor," was held not to be unconstitutional as interfering with the price of labor and the freedom of contract. Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of congressional power.

Frisbie v. U. S., (1895) 157 U. S. 165, wherein the court further said: "While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every

citizen has a right freely to contract for the price of his labor, services, or property."

Sections 12 and 13 of the Act of Congress of July 4, 1864, entitled "An Act supplementary to an Act entitled 'An Act to grant pensions'" which prescribe "the fees of agents and attorneys for making out and causing to be executed the papers necessary to establish a claim for a pension, bounty," etc., and impose a penalty on "any agent or attorney who demands or receives any greater compensation for said services" than is prescribed, are not invalid as an invasion of the liberty to contract. The power of Congress to grant pensions, includes the power to secure to the pensioner the pension granted, and to guard, by all suitable laws, the fund thus devoted from being diverted from its object, by either the craft or the extortion of unscrupulous agents. *U. S. v. Marks*, (1869) 2 Abb. (U. S.) 531, 26 Fed. Cas. No. 15,721.

10. Restraining Importation of Particular Goods. — A statute which restrains the introduction of particular goods into the United States, from considerations of public policy, does not violate the due process clause.

Buttfield v. Stranahan, (1904) 192 U. S. 493.

IX. DEPRIVATION OF PROPERTY — 1. Destruction of Property — a. ILLEGALLY IMPORTED. — There was no deprivation of property without due process of law in the destruction of teas by a collector of customs, under a statute commanding their destruction when not exported within six months after their final rejection.

Buttfield v. Stranahan, (1904) 192 U. S. 497.

To prevent effectually the importation of prohibited music and music books, may require, under certain circumstances, their summary destruction without notice; and if their nature and value demand a notice and hearing before destruction, the rules and regulations to be adopted may be so framed as to provide for the same, and protect the interests of all parties concerned, without preventing or impeding the enforcement of the copyright law, by putting the government to the necessity of resorting in the first instance

to the courts. Invalid Importations—Destruction, (1898) 22 Op. Atty-Gen. 71, wherein the attorney-general further said: "The phrase 'due process of law' does not necessarily mean by a judicial proceeding. It is not necessary, in every instance, to obtain a forfeiture by a judicial proceeding, in order to destroy property illegally used. There are cases where property illegally used may be summarily destroyed. When the property involved is of trifling value, and its destruction is necessary to effect the object of a valid law, it is within the power of the legislature to order its summary destruction."

b. ILLEGALLY ACQUIRED. — The Constitution and the common law afford protection to property, and secure its enjoyment, only when legally acquired. The destruction by a revenue officer of a barrel of whiskey found without the stamps thereon as required by law is not a criminal offense.

North Carolina v. Vanderford, (1888) 35 Fed. Rep. 282.

c. UNREGISTERED DOGS. — A city ordinance in pursuance of authority conferred by the city charter requiring a registry of dogs, and the issuance of certificates of registration, and the wearing of a collar by the dog, bearing his registered number, and providing that all dogs "not so registered and collared shall be liable to be killed by any person," authorizes the taking of property without due process of law, contrary to the Federal Constitution.

Jenkins v. Ballantyne, (1892) 8 Utah 245.

2. Assessments for Local Improvements — a. IN GENERAL. — An Act of Congress ordering the opening and extension of streets in the District of Columbia and directing the commissioners of the District to institute and conduct proceedings to condemn the necessary land, was constitutional in providing that of the amount found due and awarded as damages for and in respect of the land condemned for the opening of said streets, not less than one-half thereof should be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land to be benefited by the opening of said streets as provided for in the said Act, and that the sums to be assessed against each lot or piece or parcel of ground should be determined and designated by the jury, and that, in determining what amount should be assessed against any particular piece or parcel of ground, the jury should take into consideration the situation of said lots, and the benefits that they might severally receive from the opening of said streets.

Wight v. Davidson, (1901) 181 U. S. 381, reversing *Davidson v. Wight*, (1900) 16 App. Cas. (D. C.) 371.

See *supra*, p. 293, *Notice and Opportunity to be Heard in Assessments for Local Improvements*.

The rule of apportionment among the par-

cels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or market value of the lands, or in proportion to the benefits as estimated by commissioners. *Bauman v. Ross*, (1897) 167 U. S. 590.

b. TO BE DETERMINED BY COMMISSIONERS. — In the matter of assessing benefits, under the right of taxation, it is within the discretion of the legislature to commit the ascertainment of the lands to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe.

Bauman v. Ross, (1897) 167 U. S. 593.

c. FOR A PUBLIC PARK. — An Act of Congress authorizing the establishment of a public park in the District of Columbia does not deprive the property owners of property without due process of law, by providing for an assessment of adjacent lands for the cost and expenses of locating and improving the park, though the Act dedicates and sets apart the park "for the benefit and enjoyment of the people of the United States."

Wilson v. Lambert, (1898) 168 U. S. 611.

3. Requiring Railroad to Extend Tracks. — An Act of Congress does not deprive a railroad company in the District of Columbia of its property without due process of law, in so far as it requires the company to extend, by double tracks, the lines of its underground electric railroad to a designated point.

Metropolitan R. Co. v. Macfarland, (1902) 20 App. Cas. (D. C.) 432.

4. Railroad to Provide Sinking Fund to Meet Debts. — A railroad corporation created by an Act of Congress, and occupying a position of debtor to the United States, is not deprived of property without due process of law by a statute which requires the company, in the management of its affairs, to set aside a portion of its current income as a sinking fund to meet the government and other mortgage debts when they are matured, when Congress had reserved the right at any time to alter and amend or repeal the charter, and a charter contract of the company, in respect to the subsisting bonds, was to pay both principal and interest when the principal matured, unless the debt was sooner discharged by the application of one-half the compensation for transportation and other services rendered for the government, and five per cent. of the net earnings.

Sinking-Fund Cases, (1878) 99 U. S. 719. See also *Central Pac. R. Co. v. U. S.*, (1886) 21 Ct. Cl. 183.

5. Requiring Railroad to Pay for Lands Sold Without Right. — An Act of Congress requiring a railroad company to pay for government lands previously and without right sold and disposed of does not deprive a railroad company of property without due process of law.

Southern Pac. R. Co. v. U. S., (C. C. A. 1904) 133 Fed. Rep. 651.

6. Distrain for Payment of Taxes. — Distrain of real as well as personal property, for the payment of taxes, does not deprive the taxpayer of property without due process of law.

Springer v. U. S., (1880) 102 U. S. 593.

7. Prohibiting Restraining Assessment of Taxes. — Section 19 of the Act of July 13, 1866, as amended in 1867, providing "that no suit to restrain the assessment or collection of a tax shall be maintained in any court," was held not to be unconstitutional as depriving a taxpayer of property without due process of law, as the statute gave a speedy and inexpensive appeal to the commissioner of internal revenue, who was directed to refund all moneys paid upon illegal assessments, and if dissatisfied with his decision the party might sue in the courts which, up to that of last resort, were open.

Pullan v. Kinsinger, (1870) 2 Abb. (U. S.) 94, 20 Fed. Cas. No. 11,463.

8. Seizure of Books and Papers Relating to Alleged Fraud on Revenue. — The Act of March 2, 1867, section 2, providing that "whenever it shall be made to appear to the satisfaction of the judge of the District Court for any district in the United States, by complaint and affidavit, that any fraud on the revenue has been committed by any person or persons interested, or in any way engaged, in the importation or entry of merchandise at any port within such district, said judge shall forthwith issue his warrant, directed to the marshal of the district, requiring said marshal, by himself or deputy, to enter any place or premises where any invoices, books, or papers are deposited relating to the merchandise in respect to which such fraud is alleged to have been committed, and to take possession of such books or papers and produce them before the said judge; and any invoices, books, or papers so seized shall be subject to the order of said judge, who shall allow the examination of the same by the collector of customs of the port into which the alleged fraudulent importation shall have been made, or by any officer duly authorized by said collector," was held not to be in conflict with this clause.

Matter of Platt, (1874) 7 Ben. (U. S.) 261, 19 Fed. Cas. No. 11,212.

9. Validating Registration of Mortgages as Against Judgment Creditors. — An Act validating the registration of mortgages of personal property is not a deprivation of property without due process of law as against creditors who had obtained judgments and had sued out attachments prior to the enactment of the statute.

McFaddin v. Evans-Snider-Buel Co., (1902) 185 U. S. 513, *affirming Evans-Snider-Buel Co. v. McFadden*, (C. C. A. 1900) 105 Fed. Rep. 293.

10. Forfeiture of Counterfeit Coin. — Counterfeit coin is neither property nor the subject of property; it is the product of a felonious act, and outside the law, and its seizure and forfeiture is not a taking of property without due process of law within the meaning of this amendment. The due process of law required was neither designed to apply to such rights as a person unlaw-

fully in the possession of counterfeit coin may have in it, but was intended for the protection of substantial rights in lawful property.

Forfeiture of Counterfeit Coin, (1901) 23 Op. Atty.-Gen. 459.

11. Distress Warrant Against Defaulting Officer. — A distress warrant issued by the solicitor of the treasury under an Act of Congress, entitled "An Act providing for the better organization of the treasury department," does not deprive a defaulting officer of property without due process of law. Though "due process of law" generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true. There may be, and we have seen that there are cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial.

Murray v. Hoboken Land, etc., Co., (1856) 18 How. (U. S.) 274, wherein the court said that to ascertain whether statutory process is due process "we must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled

usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

12. Deprivation of Use of the Postal Service. — Due process of law is not denied when the disposition of property is affected by the order of an executive department and a statute authorizing the postmaster-general to seize or return to sender all letters addressed to a particular person, firm, or corporation which he is satisfied is making use of the mail for an illegal purpose.

Public Clearing House v. Coyne, (1904) 194 U. S. 508.

But see *Hoover v. McChesney*, (1897) 81 Fed. Rep. 481, wherein it was held that an order of the postmaster-general, which finds a person guilty of a violation of the postal laws, and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned, during his pleasure, is not due process of law, within the constitutional meaning; and the right to the use of the mails is a property right, and one which cannot be taken away except by due process of law. "If the United States government should hereafter become the owner of all

the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law."

13. Statutory Limitation of Patent Right. — Section 7 of the Act of March 3, 1839, providing that "every person or corporation, who has or shall have purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor and discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor or any other person interested in such invention," is not unconstitutional as depriving the inventor of his property without compensation. The patentee has no exclusive right

of property in his invention except under and by virtue of the statutes securing it to him and according to the regulations and restrictions of this statute.

Dable Grain Shovel Co. v. Flint, (1890) 137 U. S. 42, *affirmed* (1890) 42 Fed. Rep. 686.

14. Giving Unwarranted Effect to Decision of State Court. — A judgment of the Circuit Court of the United States claiming to give such unwarranted effect to a decision of a state court as to wrongfully deprive a party of his property, may be considered as presenting a question how far it can be sustained in view of the prohibitory language of this clause.

Fayerweather v. Ritch, (1904) 195 U. S. 298.

15. Inspection of Mining Claim to Ascertain Interest. — A territorial statute providing that whenever any person shall have any right to, or interest in, any mining claim which is in the possession of another person, and it shall be necessary to the ascertainment of such right that an inspection of the mining claim shall be made, and that upon a petition being presented to the court, an order for the inspection should be made, does not deprive any one of property without due process of law, when the proceeding provided by the statute requires notice, a hearing and an adjudication before a court or judge, and provides all proper protection to the party against whom the inspection is ordered.

Montana Co. v. St. Louis Min., etc., Co., (1894) 152 U. S. 162.

16. Unequal Licenses. — An Act of Congress, legislating for the District of Columbia, providing that "general brokers shall pay a tax of \$250 per annum; every person, firm, company, or association not incorporated (except insurance and real-estate brokers acting as such) that solicits business from the general public by advertisement or otherwise, and that purchases, sells, or negotiates for others securities, shares, stocks, bonds, exchange, bullion, coin, money, bank notes, or promissory notes, or that deals in futures on market quotations of prices or values on merchandise, shares, stocks, bonds, or other securities, or accepts margins on prices or values of said shares, stocks, bonds, merchandise, or securities, shall be deemed a general broker; provided, that the Washington Stock Exchange, through its president or treasurer, shall pay to the collector of taxes of the District of Columbia a sum equal to \$500 per annum in lieu of tax on the members thereof for business done on said exchange; provided further, that any broker who is a member of a regularly organized stock exchange located outside of the District of Columbia, and transacting a brokerage business therein, shall pay a sum equal to \$100 per annum to the collector of taxes of the District of Columbia," by imposing an unreasonable burden upon the right of a citizen to pursue a lawful occupation open to his competitors upon less onerous terms — which right of occupation is of the nature of property — operates substantially as the taking of property without due process of law.

Lappin v. District of Columbia, (1903) 22 App. Cas. (D. C.) 69.

17. Taking Away Right of Action for False Imprisonment. — Section 4 of the Act of Congress of March 3, 1863, providing "that any order of the President,

or under his authority, made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defense may be made by special plea, or under the general issue," is invalid as depriving a person of property in his right of action for false imprisonment.

Griffin v. Wilcox, (1863) 21 Ind. 372, the court saying: "The above section of the Act of Congress can have no greater effect than

that of a general pardon; but a pardon reaches the penalty for the crime only, not the civil right of property in damages."

18. Right to Practice Law.—A summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury is not a violation of this amendment, when due notice was given and a trial and hearing was had before the court in the manner in which proceedings against attorneys, when the question is whether they shall be struck off the roll, are always conducted.

Ex p. Wall, (1882) 107 U. S. 288.

The Act of Congress of Jan. 24, 1865, prescribing an oath to be taken before any person could be admitted as an attorney and counselor at the bar of any of the courts of the United States, that the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof; that he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that he has never sought, accepted, or attempted to exercise the functions of any office

whatssoever, under any authority, or pretended authority, in hostility to the United States; that he has not yielded a voluntary support to any pretended government, authority, power, or constitution, within the United States, hostile or inimical thereto; and, that he will support and defend the Constitution of the United States against all enemies, foreign or domestic, and will bear true faith and allegiance to the same, was held to be void as it deprived an attorney previously admitted, of property in his profession without due process of law. *In re Shorter*, (1865) 22 Fed. Cas. No. 12,811.

19. Discharge of Surplus Naval Cadets.—The Act of Aug. 5, 1882, directing that a naval cadet who completes his six years' course subsequent to that year is liable to be discharged if there be no vacancy to which he can be appointed, is constitutional.

Harmon v. U. S., (1888) 23 Ct. Cl. 406.

20. Prohibiting Emission of Dense Smoke as a Nuisance.—Congress has the power to declare the emission of thick or dense black or gray smoke from chimneys in the District of Columbia a nuisance *per se* and to punish the act as an offense. Such a statute does not deprive persons of their property without due process of law.

Moses v. U. S., (1900) 16 App. Cas. (D. C.) 433.

AMENDMENT V.

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I. NOT A LIMITATION ON THE STATES.—This clause applies only to the federal government.

Fallbrook Irrigation Dist. v. Bradley, (1896) 164 U. S. 158, reversing *Bradley v. Fallbrook Irrigation Dist.*, (1895) 68 Fed. Rep. 948.

That this amendment is not a limitation on the power of the states, see also *supra*, p. 256.

II. POWER OF EMINENT DOMAIN — 1. In General.—This clause contains an implied recognition of the right of eminent domain beyond what may justly be implied from the express grants of power.

Kohl v. U. S., (1875) 91 U. S. 372, wherein it was held to be within the power of Congress to enact a statute authorizing the secretary of the treasury to obtain by purchase or condemnation a suitable site for the erection of a building for the accommodation of a United States court, custom house, United States depository, post office, internal-revenue, and pension offices in a certain city. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy yards and lighthouses, custom houses, post offices and court houses, and for other public uses, and this right may be exercised within a state. When the power to establish post offices and to create courts within the states was conferred upon the government, included in it was authority to obtain sites for such offices and for court houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. *Affirming U. S. v. Inlots*, (1873) 2 Am. L. Rec. 314, 513, 26 Fed. Cas. No. 15,441.

This amendment admits the principle that private property may be taken for public use, if just compensation be made. *Chesapeake, etc., Canal Co. v. Key*, (1829) 3 Cranch (C. C.) 599, 5 Fed. Cas. No. 2,649. See also *Bona parte v. Camden, etc., R. Co.*, (1830) *Baldw.* (U. S.) 205, 3 Fed. Cas. No. 1,617; *Eminent Domain of Texas*, (1857) 8 Op. Atty.-Gen. 333.

This provision of the Constitution did not originate the right of eminent domain in the federal government, but simply recognizes it as a prerogative incident to sovereignty to be exercised upon the part of the government, upon the condition that compensation should be made to the owner. *Smith v. U. S.*, (1897) 32 Ct. Cl. 307.

The right of eminent domain does not rest on a statute or on a constitutional enactment. It is an attribute of sovereignty possessed by the general government, as sovereign, to enable it to perform its proper function. This amendment recognizes this attribute of sovereignty in the United States, and being thus possessed by the United States, the mode of exercising it, in the absence of any express provision in the Constitution to the contrary,

is within the discretion of the legislature. Congress, representing as it does, in the House of Representatives, the sovereignty of the people, and in the Senate the sovereignty of the state, can, whenever it deems necessary, order private property to be appropriated for public use, but such order would be subject to the constitutional limitation and would require that compensation should be made for such appropriation. *In re Rugheimer*, (1888) 36 Fed. Rep. 371.

In District of Columbia. — To a suggested distinction between the constitutional powers of the state and those of the United States in respect to the exercise of the power of eminent domain, supposed to be found in the restriction of such powers in the United States to the purposes of political administration, that it must be limited in its exercise to such

objects as fall within the delegated and express enumerated powers conferred by the Constitution upon the United States, such as are exemplified by the case of custom houses, courts, court houses, ports, dock yards, etc., the court said: "We are not called upon, by the duties of this investigation, to consider whether the alleged restriction on the power of eminent domain in the general government, when exercised within the territory of a state, does really exist, or the extent of such restriction, for we are here dealing with an exercise of the power within the District of Columbia, over whose territory the United States possess, not merely the political authority that belongs to them as respects the states of the Union, but likewise the power 'to exercise exclusive legislation in all cases whatsoever over such district.'" *Shoemaker v. U. S.*, (1893) 147 U. S. 298.

Land for Purpose of a Lighthouse. — An Act of Congress authorizing the secretary of the treasury, whenever in his opinion it is necessary or advantageous to the United States, to acquire land for the purpose of a lighthouse by condemnation under judicial process in a court of the United States in the district in which the land is situated, is a constitutional exercise of the power of Congress.

Chappell v. U. S., (1896) 160 U. S. 511, wherein the court said: "Whenever, in the execution of the powers granted to the United States by the Constitution, lands in any state are needed by the United States, for a fort, magazine, dock yard, lighthouse, custom house, court house, post office, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the state with its consent, or by pro-

ceedings in the courts of the United States, with or without any consent or concurrent Act of the state, as Congress may direct or permit. *Harris v. Elliott*, (1836) 10 Pet. (U. S.) 25; *Kohl v. U. S.*, (1875) 91 U. S. 367; *U. S. v. Jones*, (1883) 109 U. S. 513; *Pt. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 525, 531, 532; *Cherokee Nation v. Kansas R. Co.*, (1890) 135 U. S. 641, 656; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 312; *Luxton v. North River Bridge Co.*, (1893) 147 U. S. 337, and (1894) 153 U. S. 525; *Burt v. Merchants Ins. Co.*, (1871) 106 Mass. 356; *Matter of U. S.*, (1884) 96 N. Y. 227."

2. Clause a Mere Limitation on the Power. — The right of eminent domain is an incident of sovereignty and requires no constitutional recognition. This clause, providing for just compensation for property taken, is merely a limitation upon the use of the power.

U. S. v. Jones, (1883) 109 U. S. 518. See also *High Bridge Lumber Co. v. U. S.*, (C. C. A. 1895) 69 Fed. Rep. 325; *In re Manderson*, (C. C. A. 1892) 51 Fed. Rep. 503, *affirming*

In re Montgomery, (1892) 48 Fed. Rep. 896; *Smith v. U. S.*, (1897) 32 Ct. Cl. 307; *Merriam v. U. S.*, (1894) 29 Ct. Cl. 257; *U. S. v. Cooper*, (1891) 20 D. C. 116.

3. With or Without Concurrent Act of the State. — The United States, at the discretion of Congress, may acquire and hold real property in any state, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, lighthouses, custom houses, court houses, barracks, or hospitals, or for any other of the many public purposes for which such property is used; and when the property cannot be acquired by voluntary arrangement with the owners, it may be taken against their will, by the United States, in the exercise of the power of eminent domain, upon making just compensation, with or without a concurrent Act of the state in which the land is situated.

Van Brocklin v. Tennessee, (1886) 117 U. S. 154. See also *Luxton v. North River Bridge Co.*, (1894) 153 U. S. 529.

The United States possess the right of eminent domain within the states, using those terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses

when needed to execute the powers conferred by the Constitution; and the general government is not dependent upon the caprice of individuals or the will of state legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers. *Ft. Leavenworth R. Co. v. Lowe*, (1885) 114 U. S. 531.

III. PRIVATE PROPERTY — 1. No Distinction Between Real and Personal Property.

— The Constitution makes no distinction between real and personal property taken for public use.

Heflebower v. U. S., (1886) 21 Ct. Cl. 237.

2. Property of a State. — If the words "private property" have an application broad enough to include all property and ownership, the appropriation of sufficient land belonging to a state, under navigable waters, to the foundation of a bridge, which is authorized by an Act of Congress, and which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is not a diversion of the property from its original public use.

Stockton v. Baltimore, etc., R. Co., (1887) 32 Fed. Rep. 19.

3. Value of Franchise as Well as Tangible Property. — When Congress, under its power to regulate commerce, condemns and appropriates a lock and dam belonging to a navigation company on a navigable river, its action does not destroy the state franchise, and just compensation requires payment for the franchise to take tolls as well as for the value of the tangible property.

Monongahela Nav. Co. v. U. S., (1893) 148 U. S. 324.

4. Easement in Waters of a Creek. — An easement in the waters of a creek, consequent on the location of plantations and their boundary on the creek and their use as rice plantations for nearly one hundred years, dependent for flowage and drainage on the creek and the use of its waters, is property within the protection of this clause.

Lowndes v. U. S., (1901) 105 Fed. Rep. 838.

5. Negative Covenants Contained in Deeds. — Private agreements, in the nature of negative covenants contained in deeds to lots on a large tract of land, that certain and offensive trades or businesses shall not be carried on upon the land or any part thereof, are not, as against the government, to be recognized as property, when part of the land is taken by the government for the purposes of coast defense.

U. S. v. Certain Lands, (1899) 112 Fed. Rep. 624.

IV. WHAT CONSTITUTES A TAKING — 1. In General. — Taking property for public use is where the land or other property of an individual is taken from him for the use of the government or public, and where, if the property were not paid for, the burden would fall chiefly upon the persons whose property is

taken and not upon the public generally; in such case payment must be made to prevent inequality.

Michigan Cent. R. Co. v. Slack, (1876) 22 Int. Rev. Rec. 337, 17 Fed. Cas. No. 9,527a, *affirmed* *Michigan Cent. R. Co. v. Collector*, (1879) 100 U. S. 595.

2. Distinction Between Damage and Taking.— The distinction between damage and taking must be observed in applying this constitutional provision.

Bedford v. U. S., (1904) 192 U. S. 224, *affirming* (1901) 36 Ct. Cl. 474.

3. Extent of Taking Rests in Legislative Discretion.— The extent to which private property shall be taken for public use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

Shoemaker v. U. S., (1893) 147 U. S. 298.

4. Fee Passes to the Government.— When the government, by the construction of public works, so floods lands as to substantially destroy their value, resulting in a taking within the scope of this provision, the proceeding must be regarded as an actual appropriation of the lands, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, and whatever rights may attach thereto — in this case those at least which belong to a riparian proprietor — pass to the government and it becomes henceforth the full owner.

U. S. v. Lynah, (1903) 188 U. S. 470.

5. Acts Not Directly Encroaching on Private Property.— Acts done under the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are not a "taking" within the meaning of the constitutional provision for compensation. That the erection and use of fortifications for coast defense are considered, by the owner of a summer residence located upon neighboring lands, not taken for the public use, "to defeat much of the purpose he had in view in the purchase thereof, and in making his erections and improvements thereon," or even that the value of his estate is impaired thereby, gives him no right to compensation.

U. S. v. Certain Lands, (1899) 112 Fed. Rep. 623.

6. Property Destroyed for Public Safety.— But there is a distinction to be drawn between property used for government purposes and property destroyed for the public safety. If the conditions admitted of the property being acquired by contract and of being used for the benefit of the government, the obligation attaches, and it must be regarded as acquired under an implied contract; but if the taking, using, or occupying was in the nature of destruction for the general welfare or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss, in the absence of positive legislation, must be borne by him on whom it falls, and no obligation to pay can be imputed to the government.

Heflebower v. U. S., (1886) 21 Ct. Cl. 237.

7. Use Beyond Purpose of First Condemnation. — A use beyond the purpose of a first condemnation of land by right of eminent domain cannot be included in the first use if not authorized by law to be so included, and such use creates a new servitude if it casts on the land already condemned an additional burden. If such second use affects the value of said land to an extent to which it was not affected by the original taking, then it subjects the land to a new servitude, and there is a taking of private property which has not been paid for.

Payne v. Kansas, etc., R. Co., (1891) 46 Fed. Rep. 547.

8. Value of Real Estate Destroyed or Impaired — *a. IN GENERAL.* — Where real estate is actually invaded by superinduced addition of water, earth, sand, or other material, or by having any other artificial structure placed upon it so as to destroy or impair its usefulness, it is a taking within the meaning of the Constitution.

Pumpelly v. Green Bay, etc., Canal Co., (1871) 13 Wall. (U. S.) 181.

Where the government sells land by treaty or otherwise, and parts with the fee by patent without reservation, it retains no right to take that land for public use without just compensation, and it is not necessary that

there be an absolute taking or conversion of real property to the use of the public to bring the government within the operation of the constitutional rule. Impairing its value or its total destruction will render the government liable. *Johnson's Case*, (1872) 8 Ct. Cl. 244.

b. WHEN MERELY INCIDENTAL TO EXERCISE OF A SERVITUDE — (1) *In General.* — Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. When damage results from the prosecution of an improvement of a navigable river, for the public good, it is not a taking of property, but is merely incidental to the exercise of a servitude to which it was always subject.

Gibson v. U. S., (1897) 166 U. S. 271, *affirming* (1894) 29 Ct. Cl. 18.

(2) *Construction of Revetment on Banks of Navigable Stream.* — The construction of a revetment by the government along the banks of a navigable stream to resist the erosion of the banks by the waters of the river, not built on plaintiff's land, did not constitute a taking of private property for public uses within the meaning of this provision, when alleged damage to the plaintiff's land, if it could be assigned to the works at all, was but an incidental consequence of them.

Bedford v. U. S., (1904) 192 U. S. 223, *affirming* (1901) 36 Ct. Cl. 474.

c. OVERFLOWED LAND — (1) *In General.* — For the purpose of furnishing the city of Washington with a supply of water, the United States constructed and maintained an aqueduct leading from the Grand Falls of the Potomac to a distributing reservoir near the city of Washington. The aqueduct consisted of an underground conduit nine feet in diameter, with a road of macadam on the top thereof, the water passing through the conduit into a distributing reservoir situated a short distance west of the western limits of the city. In the conduit, to be used in the event of a break taking place in the same, and to regulate the flow of water, three weirs or openings were provided. It was

held that the owners of land were entitled to compensation for the portion of land actually affected by an overflow from the weirs or openings.

Clark v. U. S., (1902) 37 Ct. Cl. 593.

(2) *Rendering Land Unfit for Cultivation.* — The construction, by officers and agents of the government under the authority of Congress, of dams, training walls, and other obstructions across a river, which results in an overflow of water which it is impossible to remove, rendering property unfit for the purpose of any agriculture and depriving it of all value, is a taking of property by the government within the meaning of this provision, for the value of which the government is under an implied contract to make just compensation.

U. S. v. Lynah, (1903) 188 U. S. 469.

Land had been reclaimed by drainage and the erection of dikes and dams, and had been used for a very long period of time solely for the purpose of raising rice, and could only be so used. By the improvement of the navigation of the river by the government, and the addition of the water directly caused by the government dams, obstructions, and works backing up the water of the river and raising the water level at, upon, and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for the cultivation of rice or any other known article, the owners were compelled thereby to abandon their plantation, and the action of the government was a taking of land for public use within the meaning of this amendment. Williams v.

U. S., (1900) 104 Fed. Rep. 53. See also King v. U. S., (1893) 59 Fed. Rep. 9.

Where the government occupies land by the overflow of water with no claim of title or right, it is the exercise of the right of eminent domain, from which an implied contract arises. Merriam v. U. S., (1894) 29 Ct. Cl. 250.

Where lands are annually overflowed in consequence of government works so as to render them unfit for cultivation and to entirely destroy their value, they are taken by the government within the meaning of this clause. Jackson v. U. S., (1896) 31 Ct. Cl. 318, citing Pumpelly v. Green Bay, etc., Canal Co., (1871) 13 Wall. (U. S.) 166, construing a similar provision in a state constitution, as to land overflowed by a permanent dam.

9. *Statutory Designation of Locality.* — In the Act of Aug. 5, 1892, there is the following provision relating to street extension in the District of Columbia: "That the circle at the intersection of Sixteenth street and New Hampshire avenue, known as Hancock Circle, be, and the same is, transferred to and located at or near the intersection of Sixteenth street extended and Morris street; the location and dimensions of the said circle to be as shown on a map on file in the office of the commissioners of the District of Columbia;" and in the Act of March 2, 1895, it is provided that the authorities in charge of preparing plans for the extension of streets are authorized to omit the circle hitherto required to be located at or near Morris street. It was held that the Act of 1892 did not operate in law as an appropriation of land, so as to give the right of compensation to the owner in the form of a judgment.

Smith v. U. S., (1897) 32 Ct. Cl. 307. The court said: "The usual and ordinary form of taking is by an actual appropriation of the property, by taking physical possession of it and ousting the owner from the enjoyment and use of it; but there may be a taking in law where the possession of the res is un-

affected and no invasion is made upon the physical enjoyment of the owner;" but the Act under which it was alleged an appropriation was made in this case did not operate as a taking within the meaning of the law, so as to compel the government to pay the reasonable value of the property.

10. *Use and Occupation of Private Property.* — When the government enters upon private property as such it does so with the intent under its constitutional obligation of paying for its use and occupation; and, conversely, when the owner

assents to the occupancy by not bringing ejectment against the officer he acquiesces with the expectation of receiving a reasonable rent.

Clifford v. U. S., (1899) 34 Ct. Cl. 233.

When the government has entered upon the realty of a citizen, on his right of property being established, the government should be deemed to have entered as his tenant under

an implied lease, whereof the "just compensation" secured by the Constitution to those whose property is taken for public use should be the rent. *Johnson's Case*, (1868) 4 Ct. Cl. 250.

11. Use of Property After Owner Refused to Hire. — Where the owner of a hay press offered to sell it to a quartermaster but refused to hire it, and the officer subsequently put the machine to use in the government's service, it must be considered as property taken for public use, and the owner may recover its reasonable value, and cannot be required to take back the machine and accept compensation for its use.

Peck's Case, (1878) 14 Ct. Cl. 85.

12. Use of Land as a Military Camp. — In 1898 the claimant's farm in Pennsylvania, by authority of the secretary of war, was taken for a military camp. The owner did not object and made no effort to resume possession until the military forces relinquished it. There was no agreement for compensation. When the troops left the lands were in bad condition, unfit for farming purposes; fences had been destroyed, and other damage done. At the time of the taking the land was in the possession of a tenant. It was held that the United States became liable to the reversioner, as well as to the tenant, and that the reversioner could recover for the damages done where the extraordinary use to which the land was put by the government impaired its value.

Alexander v. U. S., (1904) 39 Ct. Cl. 383, citing *U. S. v. Pacific R. Co.*, (1887) 120 U. S. 239, in which case the court said: "In what we have said about the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where the property of loyal citizens is taken for the service of our army, such as vessels, steamboats, and the like, for the transportation of troops and munitions of war; or buildings to be used as storehouses and places of deposit for war

material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where the private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause."

13. Temporary Use of Road for Transportation of Military Supplies. — The temporary use of a turnpike road for the transportation of military supplies, rendered necessary for the purpose of carrying on actual military operations in time of war, is not a taking of property for a public use for which the government is required to make compensation by this amendment.

Claims for the Use of Turnpikes in Time of War, (1869) 13 Op. Atty-Gen. 111.

14. Removal of Bridge as an Obstruction to Navigation. — Where a bridge was erected by authority of a state before Congress assumed actual jurisdiction over the river for the purposes of navigation, and it is declared to be an obstruction to navigation, such obstruction may be removed without compensation from

the United States, and such removal cannot be regarded as a "taking of private property" within the meaning of the Constitution.

Navigable Waters — Delegation of Legislative Functions, (1896) 21 Op. Atty.-Gen. 430.

Reservation of power to revoke bridge permit. — On congressional permission being given to erect a bridge across a navigable river upon condition that it may be revoked at any time if the bridge shall be found

detrimental to navigation, the continued existence of the franchise is dependent upon the will of Congress, and the grantee, in accepting the privileges conferred by the grant, assumes all the risks of loss arising from any exercise of the power which Congress may see fit to reserve. *Newport, etc., Bridge Co. v. U. S.*, (1881) 105 U. S. 481.

15. Requiring Construction of Draw in Bridge. — When under the charter of a bridge company the contract between the bridge company and the state was that the company should have the right to erect, control, and use the bridge as a toll bridge without interference in the way of putting in compulsorily a draw until, under the acts of some authority competent to act, the river should be employed for the purposes of practical navigation, the provision looked towards ultimate improvement of the river's navigability, and that such improvement might come at the hands of the nation was reasonably contemplated. An Act of Congress requiring the construction of a draw — a right clearly reserved by the legislature of the state in granting the franchise — proposed to take for the purpose of making the river navigable only what the legislature of the state could, under the literal terms of its contract with the company, have taken for the same purpose. Such a reservation in favor of the state inures to the nation when the authority of the United States is exercised for the same purpose, under its power to regulate commerce among the states, and the bridge company is not entitled to compensation.

U. S. v. Moline, (1897) 82 Fed. Rep. 593.

16. Taking Land to Make Levee and Repair Break in Dam. — In a river improvement a break in a dam caused a washout, rendering it necessary, in the opinion of the government engineers, to take land for the purpose of making a levee and repairing the break. Part of the land was retained permanently by the government. Where the government takes and permanently appropriates land without asserting a title to it, an implied contract for compensation arises.

Morris v. U. S., (1895) 30 Ct. Cl. 162.

17. Injury to Easement of Ingress and Egress. — A direct, permanent injury to, or the destruction of, an easement, such as a right of ingress and egress, would, to the extent of the damage actually sustained, be the taking of private property for public use.

Central Trust Co. v. Hennen, (C. C. A. 1898) 90 Fed. Rep. 593.

18. Diverting Course of Stream. — If an alteration in the course of a stream, by diverting it from its natural channel to an artificial one, for the purpose of improving navigation, results in depriving the riparian owner of the use of the stream, which he is employing advantageously as an incident to his land, that is taking the private property of such owner, in the use of the water, for a public use; and he is entitled to compensation.

Avery v. Fox, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674, wherein the court said that the government of the United States may authorize alterations to be made in the course, width, etc., of navigable streams for the purpose of affording increased facilities for navigation between the states; and for this purpose may take the property of a riparian owner, but it can only take such property upon making or providing for just compensation.

gation between the states; and for this purpose may take the property of a riparian owner, but it can only take such property upon making or providing for just compensation.

19. Erection of Lighthouse on Submerged Soil.

In ejectment for the site of a lighthouse in Patapsco river, erected by the United States as a necessary aid to navigation, the plaintiff's case was that he held a grant from the state of Maryland of the submerged soil upon which the structure stood, and that it had not been condemned, nor any compensation paid or tendered for it, and that he had also, as riparian owner of the neighboring shore, the right to improve out into the river over the lighthouse site. It was held that the private interest in the submerged soil at the bottom of the river which had been granted to the plaintiff was subject to the paramount right of the public to use the river for navigation, and of the United States, in the regulation of commerce, to erect thereon such aids to navigation as were reasonably necessary, and the plaintiff's right to improve out into the river, until actually availed of, was sub-

ject to the right of the United States to use the soil under the water in aid of navigation without the plaintiff's consent, and without compensation; and also, that the United States in constructing, by authority of Congress, a necessary lighthouse upon soil under the water of the river, was exercising a right in aid of the public right of navigation, to which the plaintiff's private ownership in the submerged soil was necessarily subservient, and that by such use the United States was not taking private property, within the meaning of the Fifth Amendment of the Federal Constitution. *Hawkins Point Light-House Case*, (1889) 39 Fed. Rep. 77, *reversed and remanded* in *Chappell v. Waterworth*, (1894) 155 U. S. 102, on the ground that the case was improperly removed from the state court. But see *supra*, *Land for Purpose of a Light-house*, p. 307.

20. Establishing Telegraph Line on Railroad Right of Way. — It is beyond the authority of Congress to deprive any one of rights of property without providing compensation, and a telegraph company has no right to establish a line upon the right of way of a railroad without making compensation therefor in accordance with law.

Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co., (1874) 6 Biss. (U. S.) 158, 2 Fed. Cas. No. 632.

21. Use of Patented Invention. — Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.

James v. Campbell, (1881) 104 U. S. 358.

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie, within the jurisdiction of the Court of Claims." *Hollister v. Benedict, etc., Mfg. Co.*, (1885) 113 U. S. 67.

An inventor does not possess property in his invention which can be "taken" in the sense of the Constitution until an application for a patent is filed. *Gill v. U. S.*, (1890) 25 Ct. Cl. 415, the court saying: "Where an employee of the government takes advantage of his connection with the government to introduce his unpatented device into the public service, he giving no intimation at the time

that he regards it as property or that he intends to protect it by letters patent, but allowing the government to test the invention, at its own exclusive cost and risk, by constructing machines and bringing it into practical use before he applies for a patent, the law will not imply a contract; neither will a contract be implied in favor of the employee who has thus placed a patentable device in the public service, as to machines constructed and used after his patent has been obtained."

The use of a patented machine by the government does not constitute a taking of private property for public use within the meaning of the Constitution. Every subordinate of the United States cannot decide for himself when the emergency has occurred, or the necessity exists for the appropriation of private property. The unauthorized use of a patented machine is the infringement of the patent right, and not a caption of property. *Pitcher's Case*, (1853) 1 Ct. Cl. 7.

22. Destruction of Well by Blasting.—Where by reason of the construction of a tunnel to increase the water supply of the city of Washington, a well on an adjoining tract of land was drained and destroyed, the owner was entitled to recover under the Act of Congress authorizing the construction of the tunnel, and providing that “any person who, by reason of the taking of said land, or by the construction of the works hereinafter directed to be constructed, shall be directly injured in any property right, may, at any time within one year from the publication of notice by the attorney-general as above provided, file a petition in the Court of Claims of the United States setting forth his right or title and the amount claimed by him as damages for the property taken or injury sustained; and the said court shall hear and adjudicate such claims in the same manner as other claims against the United States are now by law directed to be heard and adjudicated therein.”

U. S. v. Alexander, (1893) 148 U. S. 186, wherein the court said: “Whether, under the constitutional provisions of the United States and of the several states, which declare that private property shall not be taken for public use without just compensation, it is necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of the provision, is a question that has often arisen, and

upon which there has not been entire uniformity of decision. * * * We do not find it necessary to consider on which side of the line thus suggested the present case would fall, for we agree with the court below in thinking that, in the Act of Congress under which this public work was done, are found provisions giving an express remedy for property damaged though not actually taken.” *Affirming* (1889) 25 Ct. Cl. 88.

23. Detention of Vessels Suspected of Violating Neutrality Laws.—Three steam vessels were suspected of being engaged in an expedition against Nicaragua, forbidden by the neutrality laws, and were detained in port by the President's order. It was held that the detention of the vessels in port by the President under the statute was not a taking and use of private property for public purposes within the meaning of the Constitution, but was an arrest under statute which was, for the case, “due process of law.”

Graham's Case, (1866) 2 Ct. Cl. 327.

24. Release by Treaty of Claims Against Foreign Government.—The government may take private property for public use by the terms of a treaty, and may release the choses in action of American citizens to a foreign government, and a release by the United States to a foreign government in part consideration of a cession of territory, of an indebtedness to an American citizen, acknowledged to be valid, is a taking of private property for public use.

Meade's Case, (1866) 2 Ct. Cl. 225.

Failure to enforce claims against foreign power.—The bargain whereby this government obtained the renunciation of the French claims against itself, and the relinquishment

of its obligations under the treaty of 1778, brings these cases within the provision of the Constitution, that “private property shall not be taken for public use without just compensation.” *Gray v. U. S.*, (1886) 21 Ct. Cl. 341.

25. Property Destroyed by Naval Officer.—The government is liable for property taken to be destroyed as for property taken to be used, and the adoption by the government of the act of a naval officer who has destroyed private property makes it the act of the government as much as if he had held precedent authority.

Wiggins's Case, (1867) 3 Ct. Cl. 418.

26. Confiscation of Property of Public Enemy. — Property confiscated under an Act of Congress as the property of a public enemy is not so taken as to give a right to recover its value under this clause.

U. S. v. Dunnington, (1892) 146 U. S. 344.

The confiscation of property in time of the civil war was within the enumerated powers

of Congress. *Knafel v. Williams*, (1868) 30 Ind. 1.

27. Repudiation of a Contract.

While the prohibition of the Federal Constitution which forbids the passage of any law impairing the obligation of contracts applies only to the states, and there is no such prohibition expressly made in relation to acts of Congress, it is not improbable that any Act of Congress which should provide for the

repudiation of any substantial part of a valid contract would be obnoxious to those other provisions of the Federal Constitution which are intended to protect the citizen and his property against arbitrary seizure and confiscation. *Taxes — Contract*, (1898) 22 Op. Atty-Gen. 194.

28. Imprisonment of Slaves for Crimes. — This clause cannot, upon any fair interpretation, apply to the case of a slave who is punished in his own person for an offense committed by him, although the punishment may incidentally affect the property of another to whom he belongs. The clause obviously applies to cases where private property is taken to be used as property for the benefit of the government, and not to cases where crimes are punishable by law.

U. S. v. Amy, (1859) 24 Fed. Cas. No. 14,445.

29. Consequential Injury — *a. IN GENERAL.* — There is a distinction between the taking of property for public uses and a consequential injury to such property by reason of some public work. In the one class the law implies a contract, a promise to pay for the property taken, which, if the taking was by the general government, will uphold an action in the Court of Claims; while in the other class there is simply a tortious act doing injury, over which the Court of Claims has no jurisdiction.

U. S. v. Lynah, (1903) 188 U. S. 472.

This provision refers only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bear-

ing upon, or to inhibit laws that indirectly work harm and loss to, individuals. *Parker v. Davis*, (1870) 12 Wall. (U. S.) 544.

See also *supra*, *When Merely Incidental to Exercise of a Servitude*, p. 310.

b. INJURY TO COAL MINE. — The government quarried stone overlying a coal mine, and water flowed into the mine and thence flooded an adjacent mine. The user of the quarry being a natural and customary one, the flooding of the claimant's adjacent property, not a probable result of the user and in no degree beneficial to the government, was not a taking of private property for public use within the meaning of the Constitution.

McIntyre v. U. S., (1890) 25 Ct. Cl. 200.

c. TO RIPARIAN RIGHTS BY ERECTION OF A PIER. — This provision has no application to the case of an owner of land bordering on a public navigable river whose access from his land to deep water is permanently lost by reason of the construction of a pier resting on submerged lands away from but in front of his upland, and which pier was erected by the United States not with

any intent to impair the rights of riparian owners, but for the purpose only of improving the navigation of such river.

Scranton v. Wheeler, (1900) 179 U. S. 153.

d. To PROPERTY BY FAULTY CONSTRUCTION OF A DAM. — In the improvement of a river, a break in a dam caused a washout, carrying away the soil on the claimant's land and leaving only worthless stone and gravel. The injury to the property caused by this faulty construction of the dam constituted no taking and appropriation of land.

Hayward v. U. S., (1895) 30 Ct. Cl. 219.

e. To LANDING BY RIVER IMPROVEMENT. — When the government, in the improvement of a navigable river, injures or destroys an adjacent landing by lessening the depth of water in the channel without physical contact with the landing, and without the occupancy or appropriation of the land, there is no liability under the Constitution. There is no liability for the consequential damages incident to the exercise of the right to improve a navigable river.

Friend v. U. S., (1895) 30 Ct. Cl. 94.

V. FOR PUBLIC USE — 1. Necessity that Use Should Be Public. — If the use for which it is purposed to take private property is not a public use, no proceedings for condemnation can be allowed.

In re Manderson, (C. C. A. 1892) 51 Fed. Rep. 503, *affirming In re Montgomery*, (1892) 48 Fed. Rep. 896.

2. Courts May Determine Fact of Public Use. — The courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use.

Shoemaker v. U. S., (1893) 147 U. S. 298.

3. Condemnation of Land for Railroad. — The condemnation of land for a railroad under an Act of Congress was held to be a taking of property for public use and valid if compensation was made.

Baltimore, etc., R. Co. v. Van Ness, (1835) 4 Cranch (C. C.) 595, 2 Fed. Cas. No. 830.

4. For Public Parks and Squares. — Land taken for public parks and squares in the District of Columbia, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use.

Shoemaker v. U. S., (1893) 147 U. S. 297.

An appropriation of land for the purposes

of a public park is a public use in the sense of the Constitution. *U. S. v. Cooper*, (1891) 20 D. C. 133.

5. Preserving Gettysburg Battle-ground. — An Act of Congress making an appropriation for continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania, was valid.

See *Encouragement of Patriotism*, 8 FED. STAT. ANNOT. 684.

VI. WITHOUT JUST COMPENSATION — 1. What Constitutes Just Compensation. — The just compensation required by the Constitution to be made to the owner

is to be measured by the loss occasioned to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more.

Bauman v. Ross, (1897) 167 U. S. 574.

The United States, in the exercise of its inherent and paramount right of eminent domain, is under its own limitation and injunction in respect to questions relating to just compensation for property taken in its own right. What would be just compensation for property taken by the general government in its exercise of the right to condemn property used for a prior federal public purpose, under its prior grant or franchise, might not be just compensation for property taken with which it had theretofore had no connection, and to which it therefore sustains the relation of an entire stranger to the title and to the property condemned. Again, what would be just compensation in a condemna-

tion proceeding by a state, where property had been dedicated to a prior public use under the exercise of a franchise granted by a state, might not be just compensation where property and rights are taken by the general government, in an independent proceeding, in the exercise of its own original and inherent right of eminent domain, to take property and rights upon just compensation. This would perhaps depend upon whether the general government, through the consent or grant of the state, and under the doctrine of subrogation, has succeeded to all the rights which would inure to the state in case of its condemnation of property created in connection with an existing easement or franchise which the state had previously granted. *Nahant v. U. S.*, (C. C. A. 1905) 136 Fed. Rep. 276.

2. Question as to Measure of Compensation Judicial, Not Legislative. — The question as to what is the measure of just compensation is judicial and not legislative. The legislature may determine what private property is needed for public purposes — that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Monongahela Nav. Co. v. U. S., (1893) 148 U. S. 327.

3. Requirement of Payment Before Consummation — *a. IN GENERAL.* — Within the meaning of this provision property, although entered upon pending an appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner.

Cherokee Nation v. Southern Kansas R. Co., (1890) 135 U. S. 659, holding that a statute which provides that, before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road, and that in the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award, to abide its judgment; and that being done the company may enter upon the property sought to be condemned and proceed with the construction of the road, is sufficiently reasonable, certain, and adequate to secure the just compensation to which the owner is entitled, and reversing (1888) 33 Fed. Rep. 900. See also *Johnson v. U. S.*, (1896) 31 Ct. Cl. 270.

Private property cannot be taken for public use until compensation is actually made. It is not enough that provision is made by law for ascertaining and making compensation

afterwards. *Avery v. Fox*, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674.

An estoppel from demanding actual payment of the compensation as a condition precedent to the taking for public uses may arise from an act of the owner. If the owner gives license, either express or fairly implied; if he expressly consents, or, with full knowledge of the taking, makes no objection, but permits the public corporation to enter upon and expend money and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from the possession for want of payment of the compensation. *Prybylowicz v. Missouri River R. Co.*, (1881) 17 Fed. Rep. 493.

By suing in the Court of Claims. — When a person has availed himself of the right to proceed against the United States in the Court of Claims, under a statute prescribing a particular mode for ascertaining the compensation which he is entitled to receive, he

has waived the right, if such right he had, to compensation in advance of the taking of his property. *Great Falls Mfg. Co. v. Garland*, (1887) 124 U. S. 599, the court saying: "This view cannot work any permanent injury to the plaintiff; for that Act expressly declares that the absolute title to the premises in question shall not vest in the United States until the owner receives payment therefor; that is, the government holds the premises for public use, subject to the condition imposed by the Constitution and by the Act of Congress, that it will, without unreasonable delay, make such compensation therefor as may be awarded by the tribunal to which the whole subject has been submitted. It is to be assumed that the United States is incapable of bad faith, and that Congress will promptly make the necessary appropriation, whenever the amount of compensation has

been ascertained in the mode prescribed by the Act of 1882."

Restraining power of the courts.—Although the courts cannot directly restrain the government of the United States, nor the action of the President as the executive power, nor that of Congress as the legislative department, yet when Congress makes an appropriation for a public improvement, and commits the execution of the work and the expenditure of the money to one of the departments, which in turn employs agents to carry forward the work, neither such department nor its agents will be exempt from the restraining power of the courts, if either seek to execute the law in an unconstitutional manner—as, by taking private property against the consent of the owner and without compensation. *Avery v. Fox*, (1868) 1 Abb. (U. S.) 246, 2 Fed. Cas. No. 674.

In Proceedings for Condemnation.—An action brought by the United States to procure the condemnation of lands for the use of a canal in process of construction is not a taking of private property for the public use or one that must necessarily result in such taking, but it is only preliminary thereto, and for the purpose of ascertaining the value of the property proposed to be taken. The final appropriation of the land will not take place, if ever, until the court gives judgment to that effect, which it is not authorized to do, and will not do, until its value has been paid to the owner or into the court for it.

U. S. v. Oregon R., etc., Co., (1883) 16 Fed. Rep. 531.

b. ADEQUATE PROVISION REQUIRED BEFORE OCCUPANCY DISTURBED.—This clause does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken, but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.

Cherokee Nation v. Southern Kansas R. Co., (1890) 135 U. S. 659, reversing (1888) 33 Fed. Rep. 900.

From voluntary contributions too uncertain.—Condemnation proceedings cannot be prosecuted under a statute which provides that the plan for the improvement of a harbor may be modified by changing the line to such position as the secretary of war may consider desirable, provided, that the title to any additional lands acquired for this purpose shall be vested in the United States without charge to the latter, though general Acts authorize the secretary of war to purchase land or materials needed for the improvement of rivers or harbors, for which provision has been made by law, at what he may consider to be a

reasonable price, without further delay, or to accept donations of the same, and, when the land or material cannot be obtained in either of these modes, to institute proceedings for their acquirement by condemnation, and give authority to any officer of the government who has been, or hereafter shall be, authorized to procure real estate for the erection of a public building, or for other public uses, to acquire the same by condemnation under judicial process whenever, in his opinion, it is necessary or advantageous for the government to do so. A statement of counsel that the damages would be paid by voluntary contributions is too uncertain to be relied on. *In re Manderson*, (C. C. A. 1892) 51 Fed. Rep. 501, affirming *In re Montgomery*, (1892) 48 Fed. Rep. 896.

c. EMERGENCY WILL NOT ADMIT OF DELAY.—A taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger is impending; and it is equally clear that the

taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service.

U. S. v. Russell, (1871) 13 Wall. (U. S.) 629. See also *Mitchell v. Harmony*, (1851) 13 How. (U. S.) 134; *Kettler v. U. S.*, (1886) 21 Ct. Cl. 179; *Mills v. U. S.*, (1884) 19 Ct. Cl. 94.

A public emergency justifies the forcible taking of private property, but the obligation to make just compensation in the future is just as strong as when property is taken without such emergency. *Mills v. U. S.*, (1884) 19 Ct. Cl. 79.

This provision is as applicable to the government as to individuals, except in cases of extreme necessity, in time of war, and of immediate and public danger. Exigencies of the kind do arise where the prohibition does not apply to the public, and in such cases it must be conceded that the officer in the public service is not a trespasser; but it is equally true that the government is bound to make full compensation to the owner. *Brady v. Atlantic Works*, (1876) 4 Cliff. (U. S.) 408, 3 Fed. Cas. No. 1,794, *reversed* on other grounds in *Atlantic Works v. Brady*, (1882) 107 U. S. 192.

Means of transportation pressed into military service.—An officer of the army in command of a military post in unsettled territory, finding it necessary to send supplies to a fort ninety miles further within such territory, surrounded by Indians, in an emergency impressed into the service of the United States twenty-four ox teams, with all their accompaniments, and used them for the transportation of the necessary supplies without the consent and against the protest of the claimant or of his wagonmaster in charge of the train. The principles of law as well as the dictates of natural justice raise an implied promise in such case to compensate the owner for the use of his property which the defendants have thus had the benefit of. It would be so in like transactions between individuals if the injured party chose to waive the tort and bring his action upon an implied assumpsit, and it is no less so when the United States are parties, since the Constitution has guaranteed to all that private property shall not be taken for public use without just compensation. *Mason's Case*, (1878) 14 Ct. Cl. 70.

4. Statute Failing to Provide for Compensation.—The Act of Aug. 1, 1888, providing "that in every case in which the secretary of the treasury, or any other officer of the government, has been, or shall hereafter be, authorized to procure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States Circuit or District Court of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the attorney-general of the United States upon every application to the secretary of the treasury, under this Act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from receipt of the application at the department of justice," is not void for failing to provide for compensation, but must be read *in pari materia* with the Constitution. The term "condemnation" used in this Act must be construed to mean condemnation with just compensation, and the machinery of the courts is employed to ascertain and secure such compensation.

In re Rugheimer, (1888) 36 Fed. Rep. 371.

5. Limit of Appropriation.—An Act of Congress providing for the condemnation of land for a public purpose is not invalid upon the ground that the amount of compensation paid for the land is limited to a sum appropriated by the Act.

U. S. v. Cooper, (1891) 20 D. C. 130.

6. Government Liable for Property Taken by Agents.—When the United States, by its agents, proceeding under the authority of an Act of Congress,

take private property for public use they are under the obligation imposed by the Constitution to make compensation.

U. S. v. Great Falls Mfg. Co., (1884) 112 U. S. 656. See also Great Falls Mfg. Co. v. Garland, (1887) 124 U. S. 581, *affirming* (1885) 25 Fed. Rep. 521.

"Although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation." U. S. v. Lynah, (1903) 188 U. S. 471.

7. Tribunal to Determine Value of Property. — The compensation to be made may be ascertained by any appropriate tribunal capable of estimating the value of the property. And whether the tribunal shall be created directly by an Act of Congress, or one already established by the state shall be adopted for the occasion, is a mere matter of legislative discretion.

U. S. v. Jones, (1883) 109 U. S. 518.

Congress may delegate to state tribunals the power to fix and determine the amount of compensation to be paid by the United

States for private property taken by them for public purposes, or adopt the rules of law prescribed by the state for that purpose. High Bridge Lumber Co. v. U. S., (C. C. A. 1895) 69 Fed. Rep. 325.

Not Required to Be Made by Jury. — By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury.

Bauman v. Ross, (1897) 167 U. S. 593.

When a person has availed himself of the right to proceed against the United States in the Court of Claims, under a statute prescribing a particular mode for ascertaining

the compensation which he is entitled to receive, he has waived the right, if such he had, to demand that the amount of compensation be determined by a jury. Great Falls Mfg. Co. v. Atty-Gen., (1888) 124 U. S. 599.

Assessments of Damages and Benefits by Different Commissioners. — Whether the estimate of damages and the assessment of benefits shall be intrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. And there are many precedents for intrusting the performance of both duties to the same person.

Bauman v. Ross, (1897) 167 U. S. 593.

8. Considering Benefits in Estimating Compensation — *a. BENEFITS RECEIVED IN COMMON WITH ALL.* — This clause excludes the taking into account, as an element in the compensation, of any supposed benefit that the owner may receive in common with all from the public uses to which the private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

Monongahela Nav. Co. v. U. S., (1893) 148 U. S. 326, wherein the court said: "The noun 'compensation,' standing by itself, carries the idea of an equivalent. Thus, we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former

being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the

equivalent of the property. And this is made emphatic by the adjective 'just.' There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital, or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken."

An Act of Congress authorizing the condemnation of land for railway uses, which provides that the appraisers "shall consider the injury which such owner may sustain

by reason of such railroad, and shall forthwith return their assessment of damages to the clerk of the court, setting forth the value of the property taken, or injury done to the property, which they assess to the owner or owners separately, to be by him filed and recorded," is invalid in so far as it provides that the benefits which the owners may receive through the increased value of the remaining land from the construction of the railroad may be set off against the value of the land actually taken. The framers of the Constitution had in contemplation the payment of money, the universal medium of exchange and measure of values, and of that only, as "just compensation" for property taken for public use. *Maryland, etc., v. R. Co. v. Hiller*, (1896) 8 App. Cas. (D. C.) 289. See also *District of Columbia v. Prospect Hill Cemetery*, (1895) 5 App. Cas. (D. C.) 497.

b. SPECIAL BENEFITS TO OWNER. — The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use, and no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of a highway, to the part not taken.

Bauman v. Ross, (1897) 167 U. S. 584, wherein the court said: "Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner, but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened."

Jury to consider benefits to accrue. — Just compensation is provided for, though in the

valuation and assessment of damages the jury are to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner; except that no assessment shall require any such owner to pay or contribute anything to the company where such benefits shall exceed, in the estimate of the jury, the value of damages ascertained. Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation to give him the full value. *Chesapeake, etc., Canal Co. v. Key*, (1829) 3 Cranch (C. C.) 599, 5 Fed. Cas. No. 2,649.

9. Payment to Rightful Owner. — On condemnation of realty which had been confiscated under the Act of 1862, proceedings were instituted in the courts of the District of Columbia, and money appropriated for the purpose by Congress was paid by order of the court to the person who purchased and was in possession under the confiscation proceedings, who held only a life estate. The Constitution requires the defendants to make "just compensation" to owners. It makes no difference to such owners through what channels or by what agency

the compensation may be sent, provided it finally reaches the right party. Placing the compensation where the rightful owners may never be able to claim it, and where, as in this case, they would by no possibility hear of it until it had passed beyond their reach, is not a fulfilment of the constitutional obligation.

Dunnington v. U. S., (1889) 24 Ct. Cl. 412.

10. Right of Ejectment on Failing to Make Compensation. — This provision was intended to be enforced by the judiciary, as one of the departments of the government established by the Constitution, and the federal courts may take jurisdiction of an action in ejectment by a citizen against officers of the government, to recover property of which he has been deprived by force and which has been converted to the use of the government without lawful authority, without due process of law, and without compensation.

U. S. v. Lee, (1882) 106 U. S. 220.

An action in ejectment will lie against the officer in possession, and judgment may be recovered against him, though it will not bind

the government nor fix the compensation to be paid for the property if it be still held for public use. *Johnson v. U. S.*, (1896) 31 Ct. Cl. 270.

AMENDMENT VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

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I. CONFLICT WITH ARTICLE III, SECTION 2, OF THE CONSTITUTION.—If there be any conflict between this amendment and the third clause of section 2, Article III., providing that “the trial of all crimes, except in cases of impeachment, shall be by jury,” the one found in the amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one.

Schick v. U. S., (1904) 195 U. S. 68.

II. LIMITED TO TRIALS IN FEDERAL COURTS—1. *In General*—This amendment was intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as a limitation upon the powers of the states.

Eilenbecker v. Plymouth County, (1890) 134 U. S. 35.

That this amendment is not a limitation on the powers of the states, see also the following cases:

United States.—*Ohio v. Dollison*, (1904) 194 U. S. 447; *West v. Louisiana*, (1904) 194 U. S. 264; *Bolin v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Jones v. U. S.*, (1890) 137 U. S. 202; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Matter of Sawyer*, (1887) 124 U. S. 219; *Brooks v. Missouri*, (1887) 124 U. S. 397; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Twitchell v. Pennsylvania*, (1868) 7 Wall. (U. S.) 324; *U. S. v. Dawson*, (1853) 15 How. (U. S.) 487; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *Williams v. Hert*, (1901) 110 Fed. Rep. 168;

In re King, (1892) 51 Fed. Rep. 438; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282; *Clark v. Dick*, (1870) 1 Dill. (U. S.) 8, 5 Fed. Cas. No. 2,818.

Connecticut.—*Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct. Hartford County, Sept. T. 1816.

Illinois.—*Keith v. Henkleman*, (1898) 173 Ill. 143.

New York.—*People v. Fish*, (1891) 125 N. Y. 151; *People v. Penhollow*, (1886) 42 Hun (N. Y.) 103; *Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100.

Rhode Island.—*State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60.

Utah.—*State v. Carrington*, (1897) 15 Utah 480; *States v. Bates*, (1896) 14 Utah 293.

Vermont.—*State v. Noakes*, (1897) 70 Vt. 253.

West Virginia.—*Ex p. McNeeley*, (1892) 36 W. Va. 95.

2. *Applicable to the District of Columbia and Territories*.—To the District of Columbia the provisions securing the right of trial by jury are applicable.

Capital Traction Co. v. Hof, (1899) 174 U. S. 5; *Callan v. Wilson*, (1888) 127 U. S. 549.

To the People of the Territories the right of trial by jury in criminal prosecutions is secured.

Callan v. Wilson, (1888) 127 U. S. 550; *Reynolds v. U. S.*, (1878) 98 U. S. 145. See *Leschi v. Territory*, (1857) 1 Wash. Ter. 13.

Alaska.—The treaty with Russia concerning Alaska declared: "The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the

free enjoyment of their liberty, property, and religion." As the Constitution is thus made applicable to Alaska, the provision of section 171 of the Code for Alaska, adopted by Congress, wherein, among other things, it was provided "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," was repugnant to this clause. *Rasmussen v. U. S.*, (1905) 197 U. S. 522.

3. Consular Courts.—Statutes giving consuls criminal jurisdiction are not invalid for not preserving to an accused person the right to be tried by jury.

In re Ross, (1890) 44 Fed. Rep. 185, *affirmed* (1891) 140 U. S. 459.

III. "IN ALL CRIMINAL PROSECUTIONS"—1. Technically Criminal Prosecution.

—This amendment relates to the prosecution of an accused person which is technically criminal in its nature.

U. S. v. Zucker, (1896) 161 U. S. 481.

The only exceptions are crimes and accusations of that class which, at the time of the adoption of the Constitution, were, by the regular course of the law and the established modes of procedure, not the subjects of jury trial. These are found to have been those

offenses against the police regulations for the protection of society against the vicious, idle, vagrant, and disorderly portion of its members. Such offenses, of necessity, must be speedily and summarily disposed of, as well for the relief of the offender as of the community. *In re Cross*, (1884) 20 Fed. Rep. 825.

2. Limited to Subjects of Indictment under Fifth Amendment.—The framers of the Constitution doubtless meant to limit the trial by jury in this amendment to those persons who were subject to indictment or presentment under the Fifth Amendment.

Ex p. Milligan, (1866) 4 Wall. (U. S.) 123.

3. Proceedings for Contempt.—A person who violates an injunction is not entitled, under the Constitution, to a trial by jury. A court, enforcing obedience for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.

In re Debs, (1895) 158 U. S. 594. See also *U. S. v. Sweeney*, (1899) 95 Fed. Rep. 434; *In re Terry*, (1889) 37 Fed. Rep. 651.

4. Issue of Insanity.—There is no absolute right to a trial by jury of a preliminary question of the fitness of the accused to be tried. The most that can be inferred from the common-law authorities is that the judge may, if he have doubts, call to his assistance the aid of a jury, and submit the matter to them, and that this has been the usual practice. The mode of trial is one which addresses itself to the sound discretion of the court when the objection is made after verdict and sentence, and there is no reason or authority for a different rule when the objection is made in bar of a trial.

Youtsey v. U. S., (C. C. A. 1899) 97 Fed. Rep. 937.

5. Proceedings for Removal of Chinese.—Section 4 of the Chinese Exclusion Act of 1892, providing "that any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period of not exceeding

one year, and thereafter removed from the United States as hereinbefore provided," should be construed, not as creating a criminal offense, but as prescribing merely a method of removal, and requiring certain detention as an incident. As the statute does not make provision for a jury trial, it cannot be construed as creating a criminal offense, or as declaring a punishment appropriate thereto, without rendering it obnoxious.

In re Sing Lee, (1893) 54 Fed. Rep. 337. See also *U. S. v. Hing Quong Chow*, (1892) 53 Fed. Rep. 233; *In re Ng Loy Hoe*, (1892) 53 Fed. Rep. 914.

A proceeding to punish an alien coming to this country from one country by banishment from this to another country, would seem to be a criminal prosecution, which should conform to this clause. *In re Mah Wong Gee*, (1891) 47 Fed. Rep. 433.

Imposing hard labor during detention period.—So much of section 4 of the Act of May 5, 1892, known as the "Geary Act," providing for the imprisonment at hard labor for a period not exceeding one year of any Chinese person, or person of Chinese descent, convicted and adjudged by the commissioner to be not lawfully entitled to be or remain in the United States, is clearly in conflict with this clause. *U. S. v. Wong Dep Ken*, (1893) 57 Fed. Rep. 211. See also *In re Ah Yuk*, (1893) 53 Fed. Rep. 781.

6. Deportation of Anarchist Alien.—The provisions securing the right of trial by jury have no application to the case of a deportation of an anarchist alien, under the Act of March 3, 1903.

U. S. v. Williams, (1904) 194 U. S. 289.

7. Suspension of Pilot for Negligence.—The negligence of a pilot, which authorizes his suspension, is not a crime or criminal proceeding within the meaning of the Constitution of the United States, and a statutory proceeding for his suspension is not invalid for failing to provide for trial by jury.

Low v. Pilotage Com'rs, (1830) R. M. Charlt. (Ga.) 302.

IV. RIGHT TO A SPEEDY TRIAL.—If this clause has any application to the order of trials of different indictments, it must relate to the time of trial and not to the place of trial, and does not prevent the removal of a defendant to another district for trial where another indictment has been found against him.

Beavers v. Haubert, (1905) 198 U. S. 86, wherein the court said: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It

does not preclude the rights of public justice. It cannot be claimed for one offense and prevent arrest for other offenses; and removal proceedings are but process for arrest—means of bringing a defendant to a trial."

V. BY AN IMPARTIAL JURY—1. In General.—A person called as a juror testified that he believed that he had formed an opinion but had not expressed it; that the opinion was based upon evidence not produced in court, and that the opinion would not influence his verdict. Upon a challenge by the defendant, for cause, the court properly overruled the challenge and permitted him to be sworn as a juror.

Reynolds v. U. S., (1878) 98 U. S. 146, wherein the court said that a juror, to be impartial, must, to use the language of Lord Coke, "be indifferent as he stands unsworn." To make out the existence of the fact of partiality, the juror who is challenged may be examined on his *voire dire*, and asked any questions that do not tend to his infamy or disgrace. It is good ground for such a challenge that the juror has formed an opinion

as to the issue to be tried, which must be founded on some evidence and be more than a mere impression. Upon the trial of the issue of fact raised by a challenge for such cause, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far

as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for

new trial, because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.

2. Common-law Jury of Twelve Persons.—A jury composed, as at common law, of twelve jurors, was intended by this amendment.

Maxwell v. Dow, (1900) 176 U. S. 586; *Thompson v. Utah*, (1898) 170 U. S. 349.

Constitutional provisions aiming to preserve to the citizens of the United States the right of trial by jury have reference to that right as it existed at the time of the adoption of such constitutional guaranty. This amendment to the Constitution must be construed with reference to the common-law right to a jury trial as the same existed at the time of its adoption as a part of the Federal Constitution. *West v. Gammon*, (C. C. A. 1899) 98 Fed. Rep. 427.

As the guaranty of a trial by jury in the third article implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal

prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. *Callan v. Wilson*, (1888) 127 U. S. 550.

The Act of Congress enacting a code for Alaska, providing "that hereafter in trials for misdemeanors six persons shall constitute a legal jury," was held to be invalid in depriving persons accused in Alaska of a right to trial by jury by a common-law jury, as Alaska was incorporated as a part of the United States. *Rasmussen v. U. S.*, (1905) 197 U. S. 518.

3. Limited to Petit Juries.—This provision distinctly means a criminal prosecution against a person who is accused, and who is to be tried by a petit jury. A criminal prosecution under Article VI. of the amendments is much narrower than a "criminal case" under Article V. of the amendments. It is entirely consistent with the language of Article V., that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.

Counselman v. Hitchcock, (1892) 142 U. S. 563. See *U. S. v. Ayres*, (1891) 46 Fed. Rep. 651.

Indictment found by grand jurors for the division of a district.—The Act of April 5, 1890, entitled "An Act to provide for the time and place to hold terms of the United States courts in the State of Washington," provides in the first section that "the State of Washington shall constitute one judicial district," and in the third section provides "that for the purpose of holding terms by the District Court said district shall be divided into four divisions, to be known as the 'Eastern,' 'Southern,' 'Northern,' and 'Western' divisions." An indictment found "by the grand jurors of the United States of America for the northern division of the district of Wash-

ington, sworn and charged to inquire of all offenses against the laws of the United States, committed within the northern division of the district of Washington," in the averment that the grand jury has been called and summoned for the northern division of the district of Washington cannot be considered a technical or verbal error. The Constitution gives an accused the right to be tried by a jury of the judicial district. *U. S. v. Dixon*, (1890) 44 Fed. Rep. 401. But in *U. S. v. Wan Lee*, (1890) 44 Fed. Rep. 707, it was held that such an indictment was valid. The proceedings of the grand juries are not void even though the court should have erred in so interpreting the law as to restrain them from inquiring of offenses committed elsewhere in the district than within the division from which they were drawn.

4. Questions of Law for the Court.—Under the Constitution of the United States, juries, in criminal trials, have not the right to decide any question of law; and if they render a general verdict, their duty and their oath require them to apply to the facts, as they may find them, the law given to them by the court.

U. S. v. Morris, (1851) 1 Curt. (U. S.) 23, 26 Fed. Cas. No. 15,815.

Where the facts are all considered, or where they are proved and uncontradicted by evidence, it has always been the practice of the courts to take the case from the jury and decide it as a question of law. *U. S. v. Anthony*, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

Story, J., in *U. S. v. Battiste*, (1835) 2 Sumn. (U. S.) 240, 24 Fed. Cas. 14,545, said: "Before I proceed to the merits of this case, I wish to say a few words upon a point, suggested by the argument of the learned counsel for the prisoner, upon which I have had a decided opinion during my whole professional life. It is, that in criminal cases, and especially in capital cases, the jury are the judges of the law, as well as of the fact. My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case tried upon the general issue. In each of these cases their verdict, when general, is necessarily compounded of law and of fact, and includes both. In each they must necessarily determine the law, as well as the fact. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court

as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen and it is his only protection. If the jury were at liberty to settle the law for themselves the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial, or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law to them upon any such trial. But, believing as I do, that every citizen has a right to be tried by the law, and according to the law; that it is his privilege and truest shield against oppression and wrong; I feel it my duty to state my views fully and openly on the present occasion."

Directing a Verdict of Guilty.—An accused person has not had a trial by an impartial jury within the meaning of the Constitution in a case where the court has directed the jury, without deliberation, to find him guilty. There can, within the meaning of the Constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it. It is doubtless true that, in a certain sense and to a limited extent, this doctrine makes the jury the judges, in criminal cases, of both law and fact; but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

U. S. v. Taylor, (1882) 11 Fed. Rep. 471.

5. Effect of Plea of Guilty.—Upon a plea of guilty no issue of fact is presented for trial by jury.

West v. Gammon, (C. C. A. 1899) 98 Fed. Rep. 428, wherein the court said: "An examination of the earliest writers on criminal law will show that at the common law, as it stood at the time of the adoption of the amendment in question, the right to a trial

by jury existed only in cases where the accused had made by his plea an issue properly triable by a jury. Should the accused see fit to plead guilty, and thus raise no issue, there was no necessity for a trial."

VI. "DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED"—

1. In General.—The locality in which an offense is charged to have been committed determines the place and court of trial.

Beavers v. Henkel, (1904) 104 U. S. 83.

It is manifestly the purpose of this amendment, among other things, to preserve to the accused in all criminal prosecutions the right to a speedy and public trial by an impartial jury in the state and district wherein the crime has been committed. *West v. Gammon*, (C. C. A. 1899) 98 Fed. Rep. 427.

Sending nonmailable matter through the mail. — Section 3894, R. S., as amended, providing in part that "any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction

thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed," must be construed in connection with this clause and section 2 of article III. of the Constitution, and the clause that permits a person accused of crime to be prosecuted and tried for the offense of which he is charged, in a court held in a state and district other than the state and district in which the crime was committed, should not be enforced. *U. S. v. Conrad*, (1894) 59 Fed. Rep. 458.

The prosecution of Jefferson Davis could only take place in some one of the states or districts in which he in person committed the offense with which he might be charged. (1866) 11 Op. Atty-Gen. 412.

2. Jurors Residents of the District. — A defendant in a criminal case cannot require that a jury for his trial shall be made up of persons coming from every neighborhood in the district, but only that the jurors shall be residents of the district.

U. S. v. Peuschel, (1902) 116 Fed. Rep. 646.

This provision was intended to fix the maximum limit within which the citizen charged with a criminal offense could be put upon his trial; but it is not to be construed to be a requirement to the effect that the jury must be summoned from the entire district, regardless of its extent, or of the burden and expense that would be thus caused to the government and the jurors

alike. *U. S. v. Ayres*, (1891) 46 Fed. Rep. 652, overruling a motion to quash an indictment, on the ground that the grand jury finding and returning the same was not a legal grand jury, for the reason that the venire issued by the court directed that the requisite number of the jurors should be summoned from a certain portion or division part of the district, based on a supposed application of this clause.

3. Effect of Transfer of Counties. — The transfer of counties from one district to another cannot affect prosecutions for offenses theretofore committed, except such as were committed in the transferred counties.

U. S. v. Peuschel, (1902) 116 Fed. Rep. 646.

4. "District Shall Have Been Previously Ascertained by Law." — The second section of Article III. provides, in respect to crimes committed in the states, that the trial by jury shall be had within the state where the crime was committed. This amendment adds the further guaranty, in respect to the place of trial, that the district shall have been previously ascertained by law, leaving the trial of offenses not committed within any state, to be controlled by the second section of Article III. The requirement in the latter section is that the trial "shall be at such place or places as the Congress may by law have directed."

Cook v. U. S., (1891) 138 U. S. 181.

VII. RIGHT TO BE INFORMED OF NATURE OF ACCUSATION — **1. Affirmation of Principles of Common Law.** — This is a reaffirmation of the essential principles of the common law, but puts it beyond the power of either Congress or the courts to abrogate them. It follows, as a matter of course, that the effect of this provision commences with the statutes fixing or declaring offenses, and, as to them, insures the general rule of the common law that they are not to be construed to embrace offenses which are not within their intention and terms. This does not mean that all the elements of a crime must be set out in the

statute on which the prosecutor relies, nor that the statute may not create an offense by the use of inapt or imperfect phraseology, but they must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state.

U. S. v. Potter, (1892) 56 Fed. Rep. 88.

2. Application to Preliminary Proceedings. — This provision applies as well to the preliminary proceedings for arrest, before indictment, as to the indictment itself.

Matter of Coleman, (1879) 15 Blatchf. (U. S.) 406, 6 Fed. Cas. No. 2,980.

3. Indictment Must Set Out Particulars — *a. IN GENERAL.* — Under a statute which provides for the punishment of those who conspire “to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States,” an indictment which, in substance, charges that the intent of the accused was to hinder and prevent citizens in the free exercise and enjoyment of “every, each, all, and singular” the rights granted them by the Constitution, with no specification of any particular right, is too vague and general.

U. S. v. Cruickshank, (1875) 92 U. S. 557, wherein the court said: “In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right ‘to be informed of the nature and cause of the accusation.’ Amend. VI. In *U. S. v. Mills*, (1833) 7 Pet. (U. S.) 142, this was construed to mean, that the indictment must set forth the offense ‘with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;’ and in *U. S. v. Cook*, (1872) 17 Wall. (U. S.) 174, that ‘every ingredient of which the offense is composed must be accurately and clearly alleged.’ It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, ‘includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species — it must descend to particulars.’” *Affirming U. S. v. Cruickshank*, (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

In order properly to inform the accused of the “nature and cause of the accusation,” within the meaning of the Constitution and of the rules of the common law, not only must all the elements of the offense be stated in the indictment, but they must also be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him reasonably to understand, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty and perhaps his life are at stake, he is not to be left so scantily informed as

to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense. *U. S. v. Potter*, (1892) 56 Fed. Rep. 89.

Bill of particulars of matter not proper to set out in indictment. — The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and the cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged, with reasonable certainty, that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice. *Rosen v. U. S.*, (1896) 161 U. S. 40.

b. NOT SUFFICIENT TO FOLLOW LANGUAGE OF STATUTE. — In prosecutions for offenses against the laws of the United States, an indictment in which the charging part follows the language of the statute upon which it is founded is not sufficient, unless such words indicate the acts constituting the offense. Every defendant in a criminal case has a constitutional right to be informed by the indictment of the nature and cause of the accusation against him, and the cause must be stated with such particularity as to indicate clearly the facts to be proven on the trial.

U. S. v. Trumbull, (1891) 46 Fed. Rep. 756.

c. OVERT ACT OF TREASON MUST BE ALLEGED. — This clause secures to one accused of treason such information as will enable him to prepare for his defense. It would not be sufficient for an indictment to allege generally that the accused had levied war against the United States, but the charge must be more particularly specified by laying what is termed an overt act by levying war.

U. S. v. Burr, (1807) 25 Fed. Cas. No. 14,693.

4. Furnishing Copy of Indictment. — There is no general obligation on the part of the government to furnish copies of indictments to defendants. "The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government. We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the government; and, when such order is made, the clerk is entitled to his fee for the copy."

U. S. v. Van Duzee, (1891) 140 U. S. 173.

VIII. RIGHT TO BE CONFRONTED WITH WITNESSES — 1. The Right Is Without Exception. — The accused shall enjoy the right to be confronted with the witnesses against him, not if they can be produced, nor if they be within the jurisdiction, but absolutely and on all occasions.

U. S. v. Angell, (1881) 11 Fed. Rep. 43.

2. Mutual Right of the Government. — This right must be mutual, and exist on the part of the government.

U. S. v. Angell, (1881) 11 Fed. Rep. 43.

3. In Action to Recover Value of Forfeited Merchandise. — This constitutional right is not infringed by permitting a deposition of a living witness to be read in an action brought to recover the value of merchandise forfeited to the United States, by reason of acts in violation of law.

U. S. v. Zucker, (1896) 161 U. S. 480, wherein the court said that this provision has no reference to any proceeding "which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed. A witness who proves

facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the

Sixth Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed

by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken."

4. Judgment of Conviction of Larceny, etc., as Evidence Against Receiver. —

So much of a statute as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen, or purloined had been embezzled, stolen, or purloined is in violation of this clause.

Kirby v. U. S., (1899) 174 U. S. 61.

5. View of Premises by Jury in Absence of Accused. — A view by the jury of the premises where an offense is alleged to have been committed, without the consent and acquiescence of the accused, without the presence of the accused and his counsel, and without the presence of the court, is not objectionable when taken by consent of the accused.

Price v. U. S., (1899) 14 App. Cas. (D. C.) 404.

6. Dying Declarations. — The admission of dying declarations is an exception to this rule. This exception was well established long before the adoption of the Constitution, and was not intended to be abrogated.

Kirby v. U. S., (1899) 174 U. S. 61. See also Robertson v. Baldwin, (1897) 165 U. S. 281.

7. Testimony upon Former Trial — a. OF WITNESS SINCE DECEASED — (1)

In General. — This provision is not infringed by permitting the testimony of a witness sworn upon a former trial to be read against the accused, when a copy of the stenographic report of the former testimony is supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness.

Mattox v. U. S., (1895) 156 U. S. 240, wherein the court said: "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of test-

ing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." See also Robertson v. Baldwin, (1897) 165 U. S. 281.

(2) *Statement or Deposition Taken on Preliminary Examination.* — The admission in evidence of a statement or deposition of a codefendant, taken at the examining trial before a commissioner, which, if accepted by the jury as true, was sufficient to establish the guilt of some if not all of the accused, was held to be in violation of the constitutional right of defendants to be confronted with witnesses against them when it did not appear that the codefendant was absent from the trial by the suggestion, procurement, or act of the accused, but, on the contrary, his absence was manifestly due to the negligence of the officers of the government.

Motes v. U. S., (1900) 178 U. S. 471.

A person was arrested and taken before the proper officer, charged with robbing the mail.

At the preliminary examination a witness, since deceased, testified in relation to the offense. The accused was present, and his counsel cross-examined the witness. Wit-

nesses were permitted to prove, on the trial before a jury, under an indictment found for the same offense, what the deceased witness testified at the preliminary examination. The rules of evidence in civil and criminal cases in this particular are the same. It is suffi-

cient in such case to prove substantially all that the deceased witness testified upon a particular subject of inquiry. *U. S. v. Macomb*, (1851) 5 McLean (U. S.) 286, 26 Fed. Cas. No. 15,702.

b. WITNESS ABSENT BY PROCUREMENT OF DEFENDANT. — When a witness had testified on a former trial for the same offense, and enough has been proven to cast the burden upon the accused of showing that he has not been instrumental in concealing or keeping the witness away, and of accounting for the absence of the witness if he would, or of denying under oath that he has kept the witness away, the court may allow evidence to be introduced to prove what was sworn to by the witness on the former trial.

Reynolds v. U. S., (1878) 98 U. S. 160, in which case the court said: "The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he had kept away. The Constitution does not guarantee an accused person against the

legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

8. Waiver of Right. — A defendant, indicted for a misdemeanor, can waive the right to be confronted with the witnesses against him, and an admission that the witnesses named in an affidavit, offered by the prosecuting attorney in support of a motion for continuance, would, if present in court, testify to the facts set forth in the affidavit, whereupon the court refused to continue the case, is a waiver of such right, and the affidavit may be read in evidence.

U. S. v. Sacramento, (1875) 2 Mont. 241.

IX. COMPULSORY PROCESS FOR OBTAINING WITNESSES — 1. At the Expense of United States for Poor Defendant. — It is the duty of the court, on the application of a prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court, and at the expense of the United States government, if the prisoner proves that he is poor, and unable to bear the expense himself.

U. S. v. Kenneally, (1870) 5 Biss. (U. S.) 122, 26 Fed. Cas. No. 15,522.

2. Right to Attendance of Members of Congress. — Upon an application to the court by the defendant for a letter to be addressed by the court to several members of Congress (Congress being in session) requesting their attendance as witnesses on his behalf, the court, *per* Chase, J., said: "The Constitution gives to every man, charged with an offense, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of Congress from the service, or the obligations, of a subpoena, in such cases. I will not sign any letter of the kind proposed. If, upon service of a subpoena, the members of Congress do not attend, a different question may arise; and it will then be time enough to decide whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after the service of a subpoena, that an attachment shall issue. A satisfactory reason may appear to the court to justify or excuse it."

U. S. v. Cooper, (1800) 4 Dall. (U. S.) 341.

AMENDMENT VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

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I TO WHAT COURTS APPLICABLE — 1. Not Applicable to Actions in State Courts. — This article relating to trials by jury applies only to courts sitting under authority of the United States.

Pearson v. Yewdall, (1877) 95 U. S. 294.

That this amendment is not a limitation on the powers of the state, see also the following cases:

United States. — *Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 156; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Walker v. Sauvinet*, (1875) 92 U. S. 93; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Justices v. Murray*, (1869) 9 Wall. (U. S.) 277; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282.

Alabama. — *Boring v. Williams*, (1850) 17 Ala. 516.

Colorado. — *Huston v. Wadsworth*, (1880) 5 Colo. 213.

Connecticut. — *Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct. Hartford County, Sept. T. 1816.

Georgia. — *Foster v. Jackson*, (1876) 57 Ga. 206.

Illinois. — *Keith v. Henkleman*, (1898) 173 Ill. 143.

Indiana. — *Lake Erie, etc., R. Co. v. Heath*, (1857) 9 Ind. 558.

Iowa. — *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 148.

Louisiana. — *Maurin v. Martinez*, (1818) 5 Mart. (La.) 432; *State v. Kennard*, (1873) 25 La. Ann. 240.

New York. — *Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Lee v. Tillotson*, (1840) 24 Wend. (N. Y.) 337; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100; *In re Newcomb*, (Supm. Ct. Spec. T. 1891) 18 N. Y. Supp. 16.

Rhode Island. — *State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60; *In re New State House*, (1895) 19 R. I. 326.

Vermont. — *Hall v. Armstrong*, (1893) 65 Vt. 424; *State v. Keyes*, (1836) 8 Vt. 57; *Huntington v. Bishop*, (1832) 5 Vt. 193.

2. Applicable to Territorial Courts. — The provisions relating to the right of trial by jury in suits at common law apply to the territories of the United States.

Thompson v. Utah, (1898) 170 U. S. 346. See also *Callan v. Wilson*, (1888) 127 U. S. 550; *Whallon v. Bancroft*, 4 Minn. 109. But see *Walker v. New Mexico, etc., R. Co.*, (1893) 7 N. Mex. 287.

This article is in force in all the organized territories of the United States. *Kennon v. Gilmer*, (1899) 131 U. S. 28.

A territorial statute prohibiting a trial by
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jury in matters of fact on which certain suits were founded is void when the organic law of the territory by express provision and by reference extends the laws of the United States

over the territory so far as they are applicable. *Webster v. Reid*, (1850) 11 How. (U. S.) 460. See also *Bradford v. Territory*, (1893) 1 Okla. 371.

3. Applicable to Courts of District of Columbia.—The provisions securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia.

Capital Traction Co. v. Hof, (1899) 174 U. S. 5, *affirming* *U. S. v. O'Neal*, (1897) 10 App. Cas. (D. C.) 205.

II. CONGRESS WITHOUT POWER TO DEPRIVE OF RIGHT.—Congress has no power under the Constitution to deprive a suitor of this right, by declaring that a case not properly within the jurisdiction of the admiralty, shall be treated and dealt with according to the known principles of courts of admiralty.

U. S. v. One Hundred and Thirty Barrels Whisky, (1865) 1 Bond (U. S.) 587, 27 Fed. Cas. No. 15,938.

III. GOVERNMENT BOUND BY THE PROVISION.—The government is as much bound by this provision as any other party who may desire to collect a debt.

Claim of Reside, (1858) 9 Op. Atty.-Gen. 197, advising that, a judgment having been recovered against the United States, which an Act of Congress declared to be due and directed the secretary of the treasury to pay, the secretary of the treasury has no authority to withhold a portion of the money thus

ordered to be paid, on the ground that the plaintiff was indebted to the government on other transactions separate from and independent of his judgment, which indebtedness had not been reduced to judgment. See *infra*, *Suits Against the Government*, p. 339.

IV. IN SUITS AT COMMON LAW — 1. Applicable to Rights and Remedies Peculiarly Legal.—This provision should be understood as limited to rights and remedies peculiarly legal in their nature, and such as it was proper to ascertain in courts of law and by the appropriate modes and proceedings of courts of law.

Shields v. Thomas, (1855) 18 How. (U. S.) 262.

This amendment is a provision exclusively

for cases at common law. *Motte v. Bennett*, (1849) 2 Fish. Pat. Cas. 642, 17 Fed. Cas. No. 9,884. See also *Keith v. Henkleman*, (1898) 173 Ill. 143.

2. Contradistinction to Equity and Admiralty Jurisprudence.—The phrase "common law" found in this clause is used in contradistinction to equity and admiralty and maritime jurisprudence.

Parsons v. Bedford, (1830) 3 Pet. (U. S.) 446, wherein the court said: "In civil causes in courts of equity and admiralty, juries do not intervene, and courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article, 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were

administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the Union, in which some new legal remedies differing from the old common-law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." See also *U. S. v. The Steamboat The Queen*,

(1870) 4 Ben. (U. S.) 237, 27 Fed. Cas. No. 16,107, *affirmed* (1873) 11 Blatchf. (U. S.) 416, 27 Fed. Cas. No. 16,108; *Scott v. Billgerry*, (1866) 40 Miss. 119; *Bradford v. Territory*, (1893) 1 Okla. 370.

Chancery jurisdiction as at time of adoption of Constitution.—A right conferred by the Constitution, as that of trial by jury, given by the Seventh Amendment, does not restrict or affect the jurisdiction of a chancery court as it existed at the time of the adoption of the Constitution. *Ross-Meehan*

Brake Shoe Foundry Co. v. Southern Malleable Iron Co., (1896) 72 Fed. Rep. 960.

Common law not made a part of the national jurisprudence.—This amendment establishes the right of trial by jury, so far as the method of trial is concerned, and, in defining such right, speaks of suits at common law as distinguished from those in equity, and does not make the common law a part of the national jurisprudence. *Gatton v. Chicago, etc., R. Co.*, (1895) 95 Iowa 148.

Civil Cases in Admiralty Are Not Embraced in this amendment. Concurrent jurisdiction at common law and in admiralty does not imply exclusion of jurisdiction from tribunals in cases admitted to have been cases in admiralty, without trial by jury.

Waring v. Clarke, (1847) 5 How. (U. S.) 460.

This amendment excludes the jurisdiction of admiralty over contracts regulated by the common law; suits upon such contracts are

appropriately "suits at common law" within the terms of the amendment, and are cognizable only in courts of common law. *Bains v. The Schooner James and Catherine*, (1832) *Baldw. (U. S.)* 544, 2 Fed. Cas. No. 756.

3. Matters of Fact in Equity Proceedings—*a. IN GENERAL.*—The right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity. In an action against a receiver, the leaving of all questions relating to the liability of the receiver in the hands of the court appointing him, does not deprive persons having claims against the insolvent corporation or the receiver of the constitutional right to a trial by jury.

Barton v. Barbour, (1881) 104 U. S. 133.

If a bill has equity in it then there is no right to trial by jury. When a suit is brought in which the bill alleges that a defendant has fraudulently assigned, conveyed, or transferred, and attempted fraudulently to convey, assign, and transfer to various persons, property, with intent to hinder and defraud the complainants and other creditors, the main question is the setting aside of fraudulent transfers of property which stand in the way of legal remedies, and subjecting such property to the payment of debts according to equity and good conscience. Where questions of amount are involved, as in this case and the common cases of foreclosure of a mortgage, the reference for such finding is to a master, according to the practice of courts of chancery in such cases. *Buford v. Holley*, (1886) 28 Fed. Rep. 681.

When recourse is had to an equitable proceeding to avoid a multiplicity of suits in which there exist certain equities common to all the complainants, this amendment does not apply in the determination of matters

of fact involved. *Home Ins. Co. v. Virginia-Carolina Chemical Co.*, (1901) 109 Fed. Rep. 691.

On a bill to foreclose a railroad-corporation mortgage, the court has jurisdiction over the whole subject-matter of the litigation, and authority to hear and determine all collateral issues that might be involved in the controversy. The court has power to appoint a receiver, and to order him to operate the road; to employ operatives and fix their wages; contract for the carrying of freight and passengers; to order payments for injury due to freight; compensate shippers for damages sustained on account of nondelivery of goods, and make reparation to persons for injuries inflicted by the negligent or wrongful action of its servants; and the court can, in its discretion, in order to a discharge of its duties, call in a jury, invoke the assistance of a master, or take such other steps for a judicial ascertainment of the facts as it might regard most appropriate in the particular case. *Kennedy v. Indianapolis, etc., R. Co.*, (1880) 3 Fed. Rep. 105.

b. CHANCERY POWER TO SUMMON A JURY.—Chancery may order an issue to be tried at law to help itself as to facts, and retried, if dissatisfied with the verdict, or it may decide facts for itself.

Woodworth v. Rogers, (1847) 3 Woodb. & M. (U. S.) 135, 30 Fed. Cas. No. 18,018.

The constitutional right of trial by jury applies only to actions at common law. In

suits in equity an inquiry by the jury depends upon the discretion of the court. *Ely v. Monson, etc., Mfg. Co.*, (1860) 4 Fish. Pat. Cas. 64, 8 Fed. Cas. No. 4,431.

Where the Ascertainment of the Plaintiff's Demand Is by Action at Law, the fact that the chancery court has power to summon a jury on occasion cannot be regarded as the equivalent of the right of trial by jury secured by this amendment.

Cates v. Allen, (1893) 149 U. S. 459.

4. Adequate Remedy at Law. — This provision of the Constitution preserves the right of jury trial against any infringement by any department of the government, and section 723, R. S., prohibits all courts of the United States from sustaining suits in equity where the remedy is complete at law.

Smith v. American Nat. Bank, (C. C. A. 1898) 89 Fed. Rep. 838, wherein the court said: "The effect of this provision is to declare that the right of trial by jury shall depend neither on legislative nor judicial discretion. In the absence of this provision, this right might be impaired (1) by the organization of courts in such manner as not to se-

cure it to suitors; (2) by authorizing courts to exercise, or by their assumption of, equity or admiralty jurisdiction over cases at law."

If the remedy at law is speedy and adequate, a party cannot avail himself of a remedy in equity created by a state statute. *Whitehead v. Entwistle*, (1886) 27 Fed. Rep. 780.

Duty of Court Ex Mero Motu to Give Effect to Constitutional Right. — Under the Constitution and Acts of Congress, the federal courts cannot take jurisdiction in equity when there is a plain, adequate, and complete remedy at law; and although objection to the jurisdiction in equity of a national court is not made by demurrer, plea, or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize of its own motion and to give it effect.

Indian Land, etc., Co. v. Shoenfelt, (C. C. A. 1905) 135 Fed. Rep. 484.

5. Suits Against the Government. — Suits against the government in the Court of Claims are not suits at common law within the true meaning of this amendment. The government cannot be sued except with its own consent. It can declare in what court it may be sued and prescribe the forms of pleading and the rules of practice to be observed in such suit, and it may restrict the jurisdiction of the court to the consideration of only certain classes of claims against the United States; and an Act of Congress referring to the trial of a cause in which the government may plead against the claimant in the Court of Claims any set-off, counterclaim, claim for damages, or other demand, and providing that the court shall hear and determine such claim and demand, both for and against the government and the claimant, is not repugnant to this amendment.

McElrath v. U. S., (1880) 102 U. S. 440, affirming (1876) 12 Ct. Cl. 312. See *supra*, *Government Bound by the Provision*, p. 337.

6. Claim Against Municipal Corporation. — A territorial statute creating a special tribunal for hearing and deciding upon claims against a municipal corporation, which have no legal obligation, and which therefore could not be enforced in a court, but which the legislature thinks have sufficient equity and are based upon a sufficiently strong moral obligation to make it proper for it

to provide for their investigation and for the payment of such as are decided to be proper, by taxation upon property situated in the city, does not violate this amendment for failing to make provision for a trial by jury in ascertaining the facts, as the proceeding is not in the nature of a suit at common law.

Guthrie Nat. Bank v. Guthrie, (1899) 173 U. S. 534.

7. Proceedings in Rem for Forfeiture. — In a proceeding *in rem* for the forfeiture of property alleged to have been manufactured and sold in violation of the internal-revenue law, the claimants are entitled to the intervention of a jury. In declaring that the proceeding should be in the nature of a proceeding *in rem*, Congress did not intend to confer admiralty jurisdiction in the sense of requiring that the cases should be tried as cases of strict admiralty jurisdiction, but intended to provide for a summary and effective mode of enforcing the Acts of Congress. The thing — the property subject to forfeiture — is to be seized and held in possession subject to the action of the court.

U. S. v. One Hundred and Thirty Barrels Whisky, (1865) 1 Bond (U. S.) 587, 27 Fed. Cas. No. 15,938.

While in actions *in rem* in admiralty property in the nature of ships may be divested from an owner without the verdict of a jury, yet in any proceeding at common law, even proceedings *in rem*, a citizen of the United States cannot be divested of his property

except by a verdict of a jury, under due process of law, in a proceeding in which he is in some manner a party, having opportunity to be heard, and having a day in court. Condemnations and forfeitures are unknown in the practice of the United States courts, except upon specific proceedings against the property, and after the verdict of a jury. *The J. W. French*, (1882) 13 Fed. Rep. 924.

8. Seizures on Land under the Revenue Laws. — In cases of seizure made on land under the revenue laws, the District Court proceeds as a court of common law according to the course of exchequer on informations *in rem*, and the trial of issues of fact is to be by jury.

The Sarah, (1823) 8 Wheat. (U. S.) 391.

9. Information for Enforcement of Penalty. — In an action on an information against a vessel and her master for the enforcement of a penalty for an alleged violation of the revenue laws, the master is entitled to a trial by jury, where the suit against the master is not made by statute cognizable in admiralty, nor is there any provision that the penalty may be recovered against the master summarily by libel, as there is against the vessel.

U. S. v. The Steamship The Queen, (1870) 4 Ben. (U. S.) 237, 27 Fed. Cas. No. 16,107, *affirmed* (1873) 11 Blatchf. (U. S.) 416, 27 Fed. Cas. No. 16,108.

10. Condemnation Proceedings. — In a proceeding to condemn certain lands to the use of the United States, this amendment does not entitle the defendant as a matter of right to a trial by jury.

U. S. v. Engerman, (1891) 46 Fed. Rep. 176.

11. For Possession of Real Estate. — An action for the recovery of real estate to obtain its possession and enjoyment is one in which both parties have a constitutional right to call for a jury.

Whitehead v. Shattuck, (1891) 138 U. S. 151.

12. Ascertaining Value of Land and Improvements in Ejectment. — Ascertaining the value of land and improvements, after a judgment in favor of the plaintiff in an ejectment suit, is not a matter which was solely cognizable at common law, and a statutory procedure which dispenses with a jury and conforms very nearly to the established chancery practice may be allowed.

Leighton v. Young, (C. C. A. 1892) 52 Fed. Rep. 442.

13. Action in Tort Against a Receiver. — A railroad corporation issued a large number of bonds, and executed a mortgage on its road, franchise, and property, to secure their payment; and, having failed to pay the interest as it accrued, a bill was filed to foreclose the security. On complainant's application a receiver was appointed to preserve and operate the property *pendente lite*. One of his trains ran over and killed a person, and the administrator filed a petition, setting forth his cause of action, and demanded a trial thereof by a jury. It was held that the court had jurisdiction in equity over all proceedings connected with the receivership, and that a trial by a jury was not a matter of right.

Kennedy v. Indianapolis, etc., R. Co., (1880) 3 Fed. Rep. 97.

14. Suit by Receiver to Recover Balance Due on Subscription to Stock. — A suit by a receiver to recover a balance due on a subscription to capital stock, which is a dependent and auxiliary bill to proceedings to wind up the company as an insolvent corporation, can be maintained in a court of equity, and in such suit the defendant cannot invoke the constitutional right of trial by jury. Jurisdiction of the creditor's suit and the receivership draws to such jurisdiction all litigation necessary to completely wind up the insolvent corporation and distribute its effects legally; and the constitutional provision for trial by jury does not in any manner restrict or affect the jurisdiction of the chancery court as it existed at the time of the adoption of the Constitution.

Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., (1896) 72 Fed. Rep. 960.

15. Claim Against a Decedent's Estate. — A claim against a decedent's estate, setting up an individual one-half interest in a mining claim, upon an alleged partnership with the deceased, was held not to be a common-law action within the meaning of this amendment.

Esterly v. Rua, (C. C. A. 1903) 122 Fed. Rep. 613.

16. Suspension of Pilot for Negligence. — A statutory proceeding for the suspension of a pilot on the ground of negligence is not a suit at common law within the meaning of this amendment.

Low v. Pilotage Com'rs, (1830) R. M. Charl. (Ga.) 302.

17. Return of Fugitive Slave. — A proceeding under the statute authorizing the reclamation of fugitives from labor, enacted under the second section of Article II. of the Constitution, is not strictly a proceeding at common law. The common law is opposed to the principle of slavery. The proceeding is

under constitutional and statutory provisions, under the forms specially provided, and not according to the course of the common law.

Miller v. McQuerry, (1853) 5 McLean (U. S.) 469, 17 Fed. Cas. No. 9,583. See also *Matter of Martin*, 2 Paine (U. S.) 348, 16 Fed. Cas. No. 9,154.

V. MAGISTRATE'S JURISDICTION OVER \$20, WITH RIGHT OF APPEAL. — It is not "trial by jury," but "the right of a trial by jury," which the amendment declares "shall be preserved." This constitutional right is not infringed by a statute which sets the pecuniary limit of the jurisdiction of justices of the peace in actions at law higher than it was when the particular constitution was adopted, allows a trial by jury for the first time upon appeal from the judgment of the justice of the peace, and requires of the appellant a bond with surety to prosecute the appeal and to pay the judgment of the appellate court.

Capital Traction Co. v. Hof, (1899) 174 U. S. 23, *affirming* *U. S. v. O'Neal*, (1897) 10 App. Cas. (D. C.) 205.

VI. RIGHT OF TRIAL BY JURY — 1. Trial by Jury Before a Justice of the Peace. — A trial by a jury of twelve men before a justice of the peace, having been unknown in England or America before the Declaration of Independence, can hardly have been within the contemplation of Congress in proposing, or of the people in ratifying, the Seventh Amendment to the Constitution of the United States.

Capital Traction Co. v. Hof, (1899) 174 U. S. 18, holding that a trial by a jury of twelve, as permitted by Congress to be had before a justice of the peace in the District of Columbia, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the

Seventh Amendment to the Constitution; and therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being re-examined by a jury in the appellate court. *Affirming* *U. S. v. O'Neal*, (1897) 10 App. Cas. (D. C.) 205.

2. Finding of Issues of Fact by the Court. — Without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.

Baylis v. Travellers' Ins. Co., (1885) 113 U. S. 320.

3. Directing a Verdict. — The law makes it the duty of the jury to return a verdict according to the evidence in the particular case before them. But if there are no facts in evidence bearing upon the issue to be determined, it is the duty of the court, especially when so requested, to instruct them as to the law arising out of that state of case. So, if there be some evidence bearing upon a particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury.

Sparf v. U. S., (1895) 156 U. S. 99.

Granting a Nonsuit for Want of Sufficient Evidence is not an infringement of the constitutional right of trial by jury.

Coughran v. Bigelow, (1896) 164 U. S. 308.

When the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for the

plaintiff, must be set aside, the court may instruct the jury to find for the defendant. *Treat Mfg. Co. v. Standard Steel, etc., Co.* (1895) 157 U. S. 674.

If, after the plaintiff's case has been closed, the court directs a verdict for the defendant on the ground that the evidence, with all the inferences which the jury could justifiably draw from it, is insufficient to support

a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would follow a principle sanctioned by repeated decisions of this court. *Baylis v. Travellers' Ins. Co.*, (1885) 113 U. S. 320.

4. Comments by the Court on the Evidence. — While a question of fact should not be taken from the jury by the court, it is the right and duty of the court to give its aid to the jury in explaining the evidence, in collating its various parts, in drawing their attention to the most material facts in proof and their application to and bearing upon the important points of the case, in ascertaining, between contradictory testimony, which is best entitled to belief; with such comments as will clearly explain to them the views taken by the court of the case. All that is necessary is, that the jury should distinctly and explicitly understand that such observations are to be received by them, merely for the purpose of assisting them in their deliberations, of recalling their recollection to the facts testified, and of turning their attention to the true points of inquiry; but that the decision to be made upon the evidence belongs altogether to them, and that no direction or authoritative instruction is intended to be given concerning them.

U. S. v. Fourteen Packages of Pins, (1832) Gilp. (U. S.) 235, 25 Fed. Cas. No. 15,151.

5. Adoption of State Remedies — a. IN GENERAL. — Where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy would be enforced in the federal courts, if it did not infringe upon the constitutional rights of the parties to a trial by jury.

Greeley v. Lowe, (1894) 155 U. S. 75.

The main purpose of section 723, R. S., was to emphasize the necessity of preserving to litigants in courts of the United States the right to trial by jury secured by the Seventh Amendment in suits at common law, and, where a state statute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the state as courts of equity, may grant the same statutory relief as that afforded in the state tribunals. In such cases, where the right of jury trial is not interfered with, the equitable remedy

afforded by the statute of the state is usually so much more complete than the old remedies that the language of section 723 interposes no obstacle to equitable jurisdiction in the federal courts. *Grether v. Wright*, (C. C. A. 1896) 75 Fed. Rep. 749.

A state law cannot control the rights of parties in the federal courts and take away privileges secured by the Constitution and laws of the United States; and a United States court cannot order a reference against the consent of either party. *U. S. v. Rathbone*, (1828) 2 Paine (U. S.) 578, 27 Fed. Cas. No. 16,121.

b. BLENDING OF LEGAL AND EQUITABLE REMEDIES. — The right given by this provision cannot be dispensed with except by the consent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings to the end that the right to a trial by a jury may be preserved intact. The general proposition as to the enforcement in the federal courts of new equitable rights created by the states is subject to the qualification that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. Neither such right

nor such inhibition can be in any way impaired, however fully the new equitable right may be enjoyed or enforced in the states by whose legislation it is created.

Scott v. Neely, (1891) 140 U. S. 109.

c. **COMPULSORY REFERENCES.** — Though the law of the state in which a federal court is sitting may provide that a court may, on the application of either party, without the consent of the other, direct a trial of the issues of fact by a referee, where the trial will require the examination of a long account on either side, such a practice cannot be followed in the federal court under section 914, R. S., as it would result in the deprivation of the right of trial by jury without consent.

Howe Mach. Co. v. Edwards, (1878) 15 Blatchf. (U. S.) 402, 12 Fed. Cas. No. 6,784. See also U. S. v. Rathbone, (1828) 2 Paine (U. S.) 578, 27 Fed. Cas. No. 16,121.

The Appointment of an Auditor in an action of book debt, according to the usual mode in such action in the state courts, to which the defendant objects, cannot be made by a federal court, as a trial by jury is expressly required in actions at law except where the parties, by written stipulation, waive a trial by jury.

Sulzer v. Watson, (1889) 39 Fed. Rep. 414.

But see Fenno v. Primrose, (C. C. A. 1903) 119 Fed. Rep. 801, wherein the court said: "Where a case within the jurisdiction of the court is presented, and the parties are entitled under the Constitution to a jury trial, and where the accounts are so numerous and confused that it would be impossible for a jury to comprehend and intelligently decide it, by reason of the complexity and diversity of the issues and items unless they are simplified by a preliminary investigation, and where for that reason it would be impossible for the court to administer justice between the parties unless such preliminary investigation and simplification are had by way of preparing the case for the ultimate tribunal,

it cannot be possible that the power of the federal court to do justice hangs solely upon the question whether there is a practice in the state court that the fees or compensation of such preliminary investigation may be taxable as costs. Under such conditions, and in the absence of a federal statute, we have no doubt of the power of the Circuit Court to direct a preliminary investigation in a proper case, and to designate a suitable person as an officer of the court to call the parties before him, as a tentative tribunal, to simplify the items and the issues in order that the case may be intelligently presented to a jury." See also Eaken v. U. S., (1822) 8 Fed. Cas. No. 4,235. See *infra*, *Matters of Account Referred to Auditor*.

6. **Matters of Account Referred to Auditor.** — A rule of the Supreme Court of the District of Columbia providing that "in actions at law brought or hereafter to be brought, grounded upon an account, or in which it may be necessary to examine and determine upon accounts between the parties, the court, in its discretion, at any stage of the cause, may order the accounts and dealings between the parties to be audited and stated by the auditor of the court, or by a special auditor or auditors to be appointed by the court; and when such order shall be made in any case, the course of proceeding before such auditor or auditors shall be the same therein, and such auditor or auditors shall have the same powers and duties in the premises as in similar cases referred to the auditor in chancery by the court sitting in equity," is valid. The constitutional guaranty does not mean that in all cases at common law there shall be a trial by jury; but that all issues of fact arising in such cases shall be tried by a jury.

Simmons v. Morrison, (1898) 13 App. Cas. (D. C.) 164. See *supra*, as to the appointment of an auditor, under *Compulsory References*.

7. Unanimity in Finding a Verdict. — A territorial statute providing that “in all civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury,” is invalid. Whether this amendment operates by its own force to invalidate this statute may be a matter of dispute, but if the amendment does not operate in and of itself to invalidate this territorial statute, it is invalidated by the Act of Congress establishing a territory which provides “that the Constitution and laws of the United States are hereby extended over and declared to be in force in said territory.”

American Pub. Co. v. Fisher, (1897) 166 U. S. 466. See also *Springville v. Thomas*, (1897) 166 U. S. 707; *Kleinschmidt v. Dunphy*, (1869) 1 Mont. 126.

As the right of trial by jury in certain suits at common law is preserved by this amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all federal courts where a jury trial is held. *Maxwell v. Dow*, (1900) 176 U. S. 586.

8. Requiring Payment of Jury Fee in Advance. — A territorial statute providing that “if at any time before the calling of the cause for trial, and before any venire shall have issued, either party shall demand a trial by a jury of twelve men, a jury of twelve men shall be summoned and impaneled, but the party demanding the same shall be required to advance and pay into said court the sum of \$20 at the time of making such demand, and the money so paid shall be paid by the said probate judge to the treasurer of the proper county as aforesaid,” is valid. The constitutional provision cannot be fairly interpreted to inhibit reasonable regulations by the legislative power to meet the expense necessary to the support of the jury system.

Venine v. Archibald, (1877) 3 Colo. 165.

9. Assessment of Damages upon Default. — When a defendant has suffered a default and has thereby admitted a cause of action, he has not a constitutional right to have the question of fact in regard to damages determined by a jury. The assessment of damages upon a default, either in actions of tort or of contract, stood at common law upon a different footing from the trial of issues of fact. The assessment of damages by a jury is matter of practice and not of right, and should be made according to the uniform practice of the state court.

Raymond v. Danbury, etc., R. Co., (1877) 14 Blatchf. (U. S.) 133, 20 Fed. Cas. No. 11,593.

10. Judgment in Absence of Affidavit of Defense. — A rule of the Supreme Court of the District of Columbia providing for a judgment by default in an action *ex contractu* on failure of a defendant to show by affidavit a good defense does not deprive the defendant of the right of trial by jury. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Fidelity, etc., Co. v. U. S., (1902) 187 U. S. 320. See also *Cropley v. Vogeler*, (1893) 2 App. Cas. (D. C.) 33, in which case the court said: “The evident meaning of the Constitution is that trial by jury, as it existed at the common law at the time of its adoption, should be preserved; and trial by

jury at common law was the mode provided for the determination of issues of facts in suits at common law when those issues had been evolved from the pleadings. A suit at common law might well result, and frequently does result, in an issue of law, through the instrumentality of a demurrer, and assuredly

it will not be claimed that in such cases there is any right to trial by jury. And it may possibly be that there are even yet other issues which have their own peculiar modes of trial, and are not proper for the inter-

vention of a jury. Until an issue of facts is evolved in a suit, there is nothing to be tried by a jury, and consequently there can be no right to trial by jury."

11. Failure to Produce Papers as a Confession of Allegations. — The fifth section of the Act of June 22, 1874, providing for the production of books, papers, etc., "in all suits and proceedings other than criminal, arising under any of the revenue laws of the United States," does not deny the right of trial by jury in providing that on failure or refusal to produce such books or papers the allegations stated in the motion shall be taken as confessed, unless the failure or refusal to produce the same shall be explained to the satisfaction of the court. Parties must first submit to and comply with all reasonable rules and orders of the court entered against them in making up the issues and preparing the case for final trial, and when the issues are made and the case is ready for trial, they then have the constitutional right to demand a jury.

U. S. v. Distillery No. Twenty-Eight, (1875) 6 Biss. (U. S.) 483, 25 Fed. Cas. No. 14,966.

12. Questions of Fact as to Negligence. — This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inferences as to the exercise of due care to be drawn from the facts when established.

Robostelli v. New York, etc., R. Co., (1888) 33 Fed. Rep. 796.

13. Specific Answers to Special Interrogatories. — It is within the power of the legislature of a territory to provide that on a trial of a common-law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such a judgment as the answers to the special questions compel.

Walker v. New Mexico, etc., R. Co., (1897) 165 U. S. 598, wherein the court said that this amendment "does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not as-

sume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law. *Affirmed* (1893) 7 N. Mex. 287.

14. Question of Construction of a Patent. — When a question of the construction of a patent is involved in the opinion of experts, that is not to be left to a jury.

Ely v. Monson, etc., Mfg. Co., (1860) 4 Fish. Pat. Cas. 64, 8 Fed. Cas. No. 4,431.

15. Finality of Decisions of Customs Appraisers. — A statute making the decision of customs appraisers final is not unconstitutional as depriving importers of a right to have the question of the dutiable value of goods passed upon by a jury. The government has a right to prescribe the conditions attend-

ing the importation of goods upon which it will permit the collector to be sued, and the provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of a suit brought against the collector.

Auffmordt v. Hedden, (1890) 137 U. S. 329.

16. Prohibiting Suits to Restrain Assessment of Taxes. — Section 19 of the Act of July 13, 1866, as amended in 1867, providing "that no suit to restrain the assessment or collection of a tax shall be maintained in any court," was held not unconstitutional as refusing trial by jury, as the statute gave a speedy and inexpensive appeal to the commissioner of internal revenue, who was directed to refund all moneys paid upon illegal assessments, and if dissatisfied with his decision the party might sue in the courts which, up to that of last resort, were open.

Pullan v. Kinsinger, (1870) 2 Abb. (U. S.) 94, 20 Fed. Cas. No. 11,463.

17. Arrest and Bail. — The arrest of a party under the provisions of the Oklahoma Code of Civil Procedure was held not to be a violation of this amendment.

Light v. Canadian County Bank, (1894) 2 Okla. 552, in which case the court said that this provision in the Constitution is "made in such terms as to justify the view that it was intended to apply solely to the ascertainment of the amount or value in controversy, and for which judgment should be entered up, and not to the method of enforcing

the judgment of the court, and to the means within the power of the court to compel compliance with its orders. Such methods of procedure for enforcing compliance with the orders of the court are within the power of the legislature of the various states, and the proceeding for arrest and bail herein referred to is among these means."

18. Wager of Law. — The wager of law, if it ever had a legal existence in the United States, was completely abolished by this amendment.

Childress v. Emory. (1823) 8 Wheat. (U. S.) 642.

19. Waiver of Right — *a. IN GENERAL.* — Parties have a right to enter into a stipulation waiving a jury and submit the case to the court upon an agreed statement of facts, even without any legislative provision for waiving a jury by a written stipulation.

Henderson's Distilled Spirits, (1871) 14 Wall. (U. S.) 53. See also *Rogers v. U. S.*, (1891) 141 U. S. 554; *Campbell v. Boyreau*, (1858) 21 How. (U. S.) 223; *Parsons v. Armor*, (1830) 3 Pet. (U. S.) 425.

The right of trial by jury secured by the Constitution of the United States is for the benefit of the parties litigating in the courts of justice, and is a privilege they may dispense with if they choose. *U. S. v. Rathbone*, (1828) 2 Paine (U. S.) 578, 27 Fed. Cas. No. 16,121.

The bringing of the suit and pressing it to a hearing on the equity side of a court,

against the protest of a defendant, should be regarded as a waiver of any right to try the case by a jury, and all the advantages, if any there be, that it might have otherwise enjoyed in a court of law. *Southern Development Co. v. Silva*, (1881) 89 Fed. Rep. 419.

By sections 648 and 649, R. S., Congress has provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. *Baylis v. Travellers' Ins. Co.*, (1885) 113 U. S. 316. See also *Louisiana v. U. S.*, (1887) 22 Ct. Cl. 88.

b. PRESUMPTION AGAINST WAIVER. — The trial by jury is a fundamental guaranty of the rights and liberties of the people; consequently every reasonable presumption should be indulged against its waiver.

Hodges v. Easton, (1882) 106 U. S. 412, wherein the court said: "It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a per-

emptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury." See also U. S. v. Rathbone, (1828) 2 Paine (U. S.) 578, 27 Fed. Cas. No. 16,121.

VII. FACTS RE-EXAMINED ONLY ACCORDING TO RULES OF COMMON LAW —

1. In General. — This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings.

Parsons v. Bedford, (1830) 3 Pet. (U. S.) 447.

"In all trials the jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and must be left to the free exercise of their functions. *Ætna L. Ins. Co. v. Ward*, (1891) 140 U. S. 76, 88. According to the rules of the common law, when a verdict has been returned it may be set aside by the trial judge, notwithstanding the sufficiency of the evidence of the successful party in point of law, if, in his judgment, the verdict was against the manifest weight of the evidence, or was, in other respects, manifestly improper or excessive. *Metropolitan R. Co. v. Moore*, (1887) 121 U. S. 558, 569. And it is not only his right to do this, but his duty also. *Woods v. Richmond, etc., R. Co.*, (1893) 1 App. Cas. (D. C.) 165, 169. In the case of *Metropolitan R. Co. v. Moore*, *supra*, the Supreme Court of the United States recognized the right of the general term of the Supreme Court of the District of Columbia to consider the weight of the evidence on appeal from the special term from an order overruling a motion for new trial; but that right was based on the peculiar organization of that court, through which, though sitting in special and general terms, it is still but one court. Hence, it was said: 'The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court.' (1887) 121 U. S. 573. Whatever

doubt might possibly have been raised by the remark in that case that the practice of the state courts in reviewing verdicts is 'perhaps forbidden' to the courts of the United States by the Seventh Amendment, has certainly been removed by the unmistakable language of later cases. *Wilson v. Everett*, (1891) 139 U. S. 616, 621; *Ætna L. Ins. Co. v. Ward*, (1891) 140 U. S. 76, 91. In this last case the court said: 'It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted.' *Barbour v. Moore*, (1897) 10 App. Cas. (D. C.) 50.

Not re-examined in another jurisdiction. — When in a state court the amount of damages recoverable had been settled in favor of the plaintiff and against the defendants, by the verdict of a jury, in a trial on which no exceptions had been saved, and a new trial, application for which had been made by motion to the court, had been denied, the defendant's liability could not be re-examined in a bankruptcy court. *Rosenthal v. Nove*, (1900) 175 Mass. 564.

Not as Modified by State Statute. — "A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to

the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the states."

Capital Traction Co. v. Hof, (1899) 174 U. S. 7, wherein the court said: "It must be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States,

otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States." *Affirming U. S. v. O'Neal*, (1897) 10 App. Cas. (D. C.) 205.

2. Control of Court over Verdict—*a.* IN GENERAL. — This does not mean only and barely that there shall be a verdict of twelve men under any conditions that may be prescribed, but that there shall be a trial by jury as understood at common law. The control of the court over the verdict after it is given is as much a part of the trial by jury as the giving of the verdict itself, and the right to have the issues tried by a second jury, or even a third jury, when the verdict of the first jury is affected by some infirmity for which the common law required the trial court to set that verdict aside, is as much a right of "trial by jury" preserved by the Constitution as the first trial.

Hughey v. Sullivan, (1897) 80 Fed. Rep. 76, holding that an *Ohio* statute, providing that "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the dam-

ages equal the actual pecuniary injury to the plaintiff," if a rule of practice or form of procedure which the federal courts sitting within the state should follow, under section 914, Rev. Stat. U. S., is inconsistent with this clause.

***b.* WEIGHT AND SUFFICIENCY OF EVIDENCE FOR THE JURY.** — The weight and balancing of evidence are for the jury, and their conclusion upon it in respect to its preponderance, when fairly reached, is not re-examinable. When a case is such that it must be submitted to the jury, conclusiveness of the verdict must follow.

Calderon v. O'Donohue, (1891) 47 Fed. Rep. 39, *affirmed* New York, etc., *Steamship Co. v. Anderson*, (C. C. A. 1892) 50 Fed. Rep. 462.

See *Ives v. Grand Trunk R. Co.*, (1887) 35 Fed. Rep. 177, as to hearing a motion for a new trial before a "full bench."

Evidence Evenly Balanced. — When, in an action against a street railway company, a verdict has been returned for the defendant, the verdict cannot be set aside when there was evidence each way on the question submitted, and it was somewhat evenly balanced.

Stewart v. Sixth Ave. R. Co., (1891) 45 Fed. Rep. 21.

If a Verdict Is So Against the Great Preponderance of evidence as to show that the jury did not consider and act upon the evidence, but were moved by passion or prejudice or some other motive, to set it aside would be according to the rules of the common law. But to set it aside because another jury might find the other way would not be in accordance with such rules.

Kelley v. Pennsylvania R. Co., (1888) 33 Fed. Rep. 857.

If, a verdict having been taken for the plaintiff by direction of the court, subject to its opinion whether the evidence was sufficient to sustain it, the court had subsequently granted a motion on behalf of the defendant for a new trial, and set aside the verdict on the ground of insufficiency of the evidence,

it would have followed a common principle in respect to which error could not have been alleged, or it might with propriety have reserved the question what judgment should be rendered, and in favor of what party, upon an agreed statement of facts, and afterwards rendered judgment upon its conclusions of law. *Baylis v. Travellers' Ins. Co.*, (1885) 113 U. S. 320.

c. DECISION ON MOTION FOR NEW TRIAL DEPENDENT ON REMISSION OF PART OF VERDICT. — To make the decision of a motion for a new trial dependent upon a remission of part of the verdict is not in effect a re-examination by the court, in a mode not known at the common law, of facts tried by the jury, and therefore is not a violation of the Seventh Amendment of the Constitution. In considering whether a new trial should be granted upon the ground that the damages allowed by the jury are palpably or outrageously excessive, the court necessarily determines in its own mind whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he remove that objection, certainly does not deprive the defendant of any right, or give him any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to have a new trial of the whole case.

Arkansas Valley Land, etc., Co. v. Mann, (1899) 130 U. S. 72.

d. AS TO CAUSES TRANSFERRED ON ABOLISHING COURTS. — When courts are abolished and cases transferred to other courts, the new courts are merely substitutes for the old, and, as regards their jurisdiction and capacity to dispose of cases remitted to them, are the same courts, and power to re-examine facts tried by a jury goes with the cases.

U. S. v. Haynes, (1887) 29 Fed. Rep. 696.

3. Courts of Appeal Without Jurisdiction to Re-examine Facts. — A United States Court of Appeals has no jurisdiction to re-examine facts tried by a jury.

Parsons v. Bedford, (1830) 3 Pet. (U. S.) 433, as to an appeal to the Supreme Court from a Circuit Court. See also *U. S. v. Haynes*, (1887) 29 Fed. Rep. 691, as to an appeal to a Circuit Court from a District Court.

Whilst in most, if not all, of the states of the Union the appellate courts have the right to review the facts as well as the law in all appeals, as if they were proceedings in equity, that power has been expressly denied to the courts of the United States by this amendment. *Barbour v. Moore*, (1897) 10 App. Cas. (D. C.) 50.

4. On Removals from State Courts — a. AFTER TRIALS IN STATE COURTS —
(1) *In General.* — So much of the Act of Congress of March 3, 1863, section 5, entitled "An Act relating to habeas corpus and regulating proceedings in

certain cases," as provided for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the Circuit Court of the United States for a retrial on the facts and law, was held not to be in pursuance of the Constitution and void.

Justices v. Murray, (1869) 9 Wall. (U. S.) 277. See also *Maxwell v. Dow*, (1900) 176 U. S. 598; *Stevenson v. Williams*, (1873) 19 Wall. (U. S.) 576; *McKee v. Rains*, (1869) 10 Wall. (U. S.) 25; *Brodhead v. Shoemaker*,

(1890) 44 Fed. Rep. 525; *Murray v. Patrie*, (1866) 5 Blatchf. (U. S.) 343, 17 Fed. Cas. No. 9,967; *Patrie v. Murray*, (1864) 43 Barb. (N. Y.) 323.

(2) *When New Trial Granted.* — This clause has no application to a case which has been removed from a state court into a United States court after a judgment in the state court had been vacated, the verdict set aside, and a new trial granted.

Home L. Ins. Co. v. Dunn, (1873) 19 Wall. (U. S.) 226. But see *Bryant v. Rich*, (1870) 106 Mass. 193.

b. *ON WRIT OF ERROR FROM UNITED STATES SUPREME COURT.* — The last clause of this amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by a writ of error from the highest court of the state.

Chicago, etc., R. Co. v. Chicago, (1897) 166 U. S. 242, in which case the court said: "One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not, in express words, preserve the right of trial by jury, and that under it, facts tried by a jury could be re-examined in the courts of the United States otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet these objections, and to deprive the courts of the United States of any such authority."

This clause applies to the appellate powers of the United States in all common-law cases

coming up from an inferior federal court, and also to the Circuit Court in like cases in the exercise of its appellate power, and also in cases of federal cognizance coming up from a state court. *Justices v. Murray*, (1869) 9 Wall. (U. S.) 278.

A federal court, having no appellate or supervisory jurisdiction over proceedings in a state court, cannot re-examine the facts constituting the cause of action on which the judgment was rendered, or annul, vacate, or in any manner modify the judgment. *Dillingham v. Hawk*, (C. C. A. 1894) 60 Fed. Rep. 497.

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

I. LIMITATION ON POWERS OF FEDERAL GOVERNMENT ONLY, 352.

II. APPLICABLE TO ORGANIZED TERRITORIES, 352.

III. EXCESSIVE BAIL, 353.

IV. EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENTS, 353.

1. *When Within the Statute*, 353.
2. *Comparison with Undue Leniency in Another Case*, 353.
3. *Punishments of Torture*, 353.
4. *Ten Years for Assault with Dangerous Weapon*, 354.
5. *Fifty Dollars and Three Months' Hard Labor for Illegal Sale of Liquor*, 354.
6. *Shooting as a Mode of Executing Death Penalty*, 354.

V. APPELLATE JURISDICTION OF UNITED STATES SUPREME COURT, 354.

I. LIMITATION ON POWERS OF FEDERAL GOVERNMENT ONLY.— This amendment is addressed to the courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion, and does not apply to the states.

Ex p. Watkins, (1833) 7 Pet. (U. S.) 573.

That this amendment is not a limitation on the powers of the state, see also the following cases:

United States.— *Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monongahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *O'Neil v. Vermont*, (1892) 144 U. S. 332; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.) 552, 557; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410, 434; *Barron v. Baltimore*, (1833) 7 Pet. (U. S.) 243, 247; *Livingston v. Moore*, (1833) 7 Pet. (U. S.) 551; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282.

Connecticut.— *Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct., Hartford County, Sept. T. 1816.

Illinois.— *Keith v. Henkleman*, (1898) 173 Ill. 143.

Maryland.— *Foote v. State*, (1882) 59 Md. 264.

Massachusetts.— *Com. v. Hitchings*, (1855) 5 Gray (Mass.) 485.

New York.— *Barker v. People*, (1824) 3 Cow. (N. Y.) 686; *Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100.

Pennsylvania.— *James v. Com.*, (1825) 12 S. & R. (Pa.) 220, in which case it was held that the ducking-stool was not the punishment of a common scold in Pennsylvania.

Rhode Island.— *State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60.

Vermont.— *State v. Hodgson*, (1893) 66 Vt. 156.

Virginia.— *Southern Express Co. v. Com.*, (1895) 92 Va. 67.

Effect of Fourteenth Amendment.— In *O'Neil v. Vermont*, (1892) 144 U. S. 323, Justice Field, in a dissenting opinion, holds that the Fourteenth Amendment has made this amendment applicable to the states.

II. APPLICABLE TO ORGANIZED TERRITORIES.— Organized territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.

By virtue of that power, the legislative branch of a territory may define offenses, and prescribe punishment of the offenses, subject to the provision that cruel and unusual punishments shall not be inflicted.

Wilkerson v. Utah, (1878) 99 U. S. 133.

III. EXCESSIVE BAIL.—To require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.

U. S. v. Lawrence, (1835) 4 Cranch (C. C.) 518, 26 Fed. Cas. No. 15,577, wherein the court said that the discretion of the magistrate in taking bail in a criminal case is

to be guided by the compound consideration of the ability of the prisoner to give bail, and the atrocity of the offense. See also *U. S. v. Brawner*, (1881) 7 Fed. Rep. 89.

IV. EXCESSIVE FINES, CRUEL AND UNUSUAL PUNISHMENTS—1. When Within the Statute.

The sentence and punishment imposed upon a defendant for any violation of the provisions of the statute, which is within the punishment provided for by the statute, cannot be regarded as excessive, cruel, or unusual. *Jackson v. U. S.*, (C. C. A. 1900) 102 Fed. Rep. 487.

The provision has its origin in an Act of Parliament in 1688, entitled, "An Act declaring the rights and liberties of the subject, and settling the succession of the crown;" which Act set forth numerous grievances, and among them, that "excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for

the liberty of the subjects; and excessive fines have been imposed, and illegal and cruel punishments inflicted." And it is therein declared that excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted. Statute 1 W. and M., ch. 2. The declaration of rights as contained in this Act of Parliament relates to the executive and judicial departments of the government of England. The language as used in our Federal Constitution is a limitation upon the authority of Congress, and has no application whatever to the government of the states. *Martin v. Johnson*, (1895) 11 Tex. Civ. App. 633.

2. Comparison with Undue Leniency in Another Case.—Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one.

Howard v. Fleming, (1903) 191 U. S. 136.

3. Punishments of Torture.—Difficulty would attend the effort to determine the exactness and the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted, but it is safe to affirm that punishments of torture, such as those formerly inflicted for atrocious crimes and for high treason, and all others in the same line of unnecessary cruelty, have been forbidden by this amendment.

Wilkerson v. Utah, (1878) 99 U. S. 135.

Whipping.—A New Mexico territorial statute providing that "every person who shall be convicted of stealing a horse, mare, colt, or filly, horse mule or mare mule, ass or jennet, bullock, cow, or calf, sheep, goat, or hog, shall be punished by not less than thirty lashes, well laid on his bare back, nor more than sixty, at the discretion of the court trying such cause, and shall be confined in the county jail until the costs of the prosecution are paid and the sentence fully complied with," was held not to be unconstitutional as inflicting cruel and unusual punishment. *Garcia v. Territory*, (1869) 1 N. Mex. 416.

"There may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated, and exceptional cases, where the courts have interfered, and held the sentence to be in violation of the provisions of the Constitution. * * * The extent of the punishment, upon conviction, ought to be such as is warranted by law, and such as appears to be best calculated to answer the ends of precaution necessary to deter others from the commission of like offenses, in addition to the punishment of the individual offender." *Jackson v. U. S.*, (C. C. A. 1900) 102 Fed. Rep. 488.

4. Ten Years for Assault with Dangerous Weapon. — The punishment of ten years in prison, for the crime of an assault with a dangerous weapon, was held not to be out of all proportion to the offense.

Jackson v. U. S., (C. C. A. 1900) 102 Fed. Rep. 488.

5. Fifty Dollars and Three Months' Hard Labor for Illegal Sale of Liquor. — This clause does not apply to state but to national legislation. "But if this were otherwise the defense could not avail the plaintiff in error. The offense charged was the keeping and maintaining, without license, a tenement for the illegal sale and illegal keeping of intoxicating liquors. The plea does not set out the statute imposing fines and penalties for the offense. But it appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance."

Pervear v. Massachusetts, (1866) 5 Wall (U. S.) 475.

6. Shooting as a Mode of Executing Death Penalty. — The punishment of shooting as a mode of executing a death penalty for the crime of murder in the first degree is not a cruel and unusual punishment within the meaning of this amendment. A territorial statute authorizing a court to inflict such a punishment is not invalid.

Wilkerson v. Utah, (1878) 99 U. S. 134.

V. APPELLATE JURISDICTION OF UNITED STATES SUPREME COURT. — The Supreme Court has no appellate jurisdiction to revise sentences of inferior courts in criminal cases, and cannot, even if the excess of the fine were apparent on the record, reverse the sentence.

Ex p. Watkins, (1833) 7 Pet. (U. S.) 573. See also *American Constr. Co. v. Jacksonville, etc., R. Co.*, (1893) 148 U. S. 378.

AMENDMENT IX.

“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

To the States this amendment does not extend.

Livingston v. Moore, (1833) 7 Pet. (U. S.) 551.

That this amendment, with the other first ten amendments, is not a limitation on the powers of the states, see also the following cases:

United States.—*Ohio v. Dollison*, (1904) 194 U. S. 447; *Bolln v. Nebraska*, (1900) 176 U. S. 87, *affirming* (1897) 51 Neb. 581; *Brown v. New Jersey*, (1899) 175 U. S. 174; *Brown v. Walker*, (1896) 161 U. S. 606, *affirming* (1895) 70 Fed. Rep. 46; *Monogahela Nav. Co. v. U. S.*, (1893) 148 U. S. 324; *McElvaine v. Brush*, (1891) 142 U. S. 158; *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 34; *Spies v. Illinois*, (1887) 123 U. S. 131, 166; *Edwards v. Elliott*, (1874) 21 Wall. (U. S.)

552, 557; *Fox v. Ohio*, (1847) 5 How. (U. S.) 410; *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151; *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282.

Connecticut.—*Colt v. Eves*, (1837) 12 Conn. 251; *State v. Phelps*, Super. Ct., Hartford County, Sept. T. 1816.

Illinois.—*Keith v. Henkleman*, (1898) 173 Ill. 143.

New York.—*Murphy v. People*, (1824) 2 Cow. (N. Y.) 815; *Jackson v. Wood*, (1824) 2 Cow. (N. Y.) 819, note; *Livingston v. New York*, (1831) 8 Wend. (N. Y.) 85, 100.

Rhode Island.—*State v. Paul*, (1858) 5 R. I. 185, 196; *State v. Keeran*, (1858) 5 R. I. 497; *In re Fitzpatrick*, (1888) 16 R. I. 60.

AMENDMENT X.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

- I. GENERAL RESERVED POWERS, 356.
- II. DEPENDENT ON CONSTRUCTION OF THE WHOLE CONSTITUTION, 357.
- III. POLICE POWER, 357.
 - 1. *In General*, 357.
 - 2. *Federal Tax on Manufacture and Sale of Commodities*, 357.
 - 3. *Making Settlement on Indian Lands Unlawful*, 358.
- IV. STATE POWER OF TAXATION, 358.
 - 1. *In General*, 358.
 - 2. *Tax on Domestic Corporations*, 359.
 - 3. *Concurrent State and Federal Power on the Same Subjects*, 359.
 - 4. *Limited by Grants of Federal Power*, 359.
- V. MATTERS RELATING TO STATE COURTS, 360.
- VI. AS TO RIGHTS OF PROPERTY, 360.
- VII. SHORES OF, AND SOILS UNDER, NAVIGABLE WATERS, 360.
- VIII. MANDAMUS FROM STATE COURT TO FEDERAL OFFICER, 360.
- IX. TAXATION BY CONGRESS OF MUNICIPAL REVENUE, 360.
- X. RESTRAINING STATE CORPORATION FROM INTERFERING WITH INTER-STATE COMMERCE, 361.

I. GENERAL RESERVED POWERS. — The reservation to the states respectively only means the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated would be trespassing upon the rights of the states or the people, and would not be the supreme law of the land, but null and void.

Gordon v. U. S., (1864) 117 U. S. 705.

"The powers the people have given to the general government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them." *Per* Brewer, J., *concurring* in *U. S. v. Williams*, (1904) 194 U. S. 295.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the

states respectively, or to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states. *Collector v. Day*, (1870) 11 Wall. (U. S.) 124.

This cannot, with any propriety, be read as a new grant to the states or the people of such power as had not been delegated or pro-

hibited by the Constitution, for that would assume the existence of a considerable period of time when these powers were either in abeyance or vested somewhere else, which is an assumption inadmissible as inconsistent with the nature of governmental powers. It must be concluded that Article X. was intended as declaratory of a pre-existing intent of the Constitution, and that would lead us to construe the Constitution precisely as if the tenth article of amendment had been incorporated in it at its first adoption. Reading, then, the Constitution with this reservation, it is necessary that the terms of every grant should be construed as the express limitation of such grant where that is reasonably possible. *State v. Davis*, (1879) 12 S. Car. 534.

The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative, nor judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the Con-

stitution, in express terms, provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." *Ex p. Merryman*, (1861) Taney (U. S.) 246, 17 Fed. Cas. No. 9,487.

Any legislation of Congress beyond the limits of the powers delegated is an invasion of the rights reserved to the states or to the people, and is necessarily void. *Matter of Pacific R. Commission*, (1887) 32 Fed. Rep. 254.

The exclusive alienation of state sovereignty can only exist in three cases: where by its terms it is so, or where a power is conferred on the federal government, and the states are prohibited from exercising a similar authority, or where an authority is granted to the former, to which the exercise of a like power on the part of the different states would be absolutely and totally contradictory and repugnant. *Adams v. Storey*, (1817) 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66.

II. DEPENDENT ON CONSTRUCTION OF THE WHOLE CONSTITUTION.— There is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. This amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;" thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.

McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 406.

Similar clause in Article of Confederation.— The same reservation, in substance, was contained in the second article of the Articles of Confederation, except that the word "expressly" was there placed before the word

"delegated." The omission of this word in the Tenth Amendment is most significant, and shows the object was not to interfere with or restrict any of the powers delegated to the United States by the Constitution, whether expressly delegated or not. *Metropolitan Bank v. Van Dyck*, (1863) 27 N. Y. 416.

III. POLICE POWER — 1. In General.— The police power of the states is limited by the express prohibitions in the Federal Constitution upon a state's action. For instance, the state may regulate fares and freights, but inasmuch as the regulation of interstate commerce is vested in the general government, the state's police power to regulate freights and tariffs does not extend to interstate commerce.

State v. Kansas City, etc., R. Co., (1887) 32 Fed. Rep. 723. See *Smith v. Bivens*, (1893) 56 Fed. Rep. 356. See also *Police Power of the States*, FED. STAT. ANNOT., vol.

8, p. 390; and *Police Powers*, vol. 8, p. 752, and under other clauses; consult the Index, under *Police Power*.

2. Federal Tax on Manufacture and Sale of Commodities.— An Act of Congress, imposing taxes on the manufacture and sale of oleomargarine, which

provides for the marking of packages used by retail dealers in oleomargarine, does not invade the police power of the state when the principal object of the Act is the raising of revenue and not the protection to purchasers.

U. S. v. Dougherty, (1900) 101 Fed. Rep. 440. See also *In re Kollock*, (1897) 165 U. S. 532.

3. Making Settlement on Indian Lands Unlawful. — A state statute made it unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the Act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons. It was held to be a police regulation for the protection of the Indians from the intrusion of the white people, and to preserve the peace. Notwithstanding the peculiar relation which these Indian nations hold to the government of the United States, the state had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the commonwealth, and to protect these feeble and helpless bands from imposition and intrusion. The power of a state to make such regulations to preserve the peace of the community is absolute, and has never been surrendered.

New York v. Dibble, (1858) 21 How. (U. S.) 368.

IV. STATE POWER OF TAXATION — 1. In General. — The taxing power of a state is one of its attributes of sovereignty; it exists independently of the Constitution of the United States, and underived from that instrument, and may be exercised to an unlimited extent upon all property; trades, business, and avocations existing or carried on within the territorial boundaries of the state, except so far as it has been surrendered to the federal government, either expressly or by necessary implication.

Union Pac. R. Co. v. Peniston, (1873) 18 Wall. (U. S.) 29. See also *Duer v. Small*, (1859) 4 Blatchf. (U. S.) 263, 7 Fed. Cas. No. 4,116.

Where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the state, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some direct bearing on foreign commerce, the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property,

real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation, and there is no federal power under the Constitution which can impair this exercise of state sovereignty. *Nathan v. Louisiana*, (1850) 8 How. (U. S.) 82, affirming *State v. Nathan*, (1845) 12 Rob. (La.) 332.

“With the exception of the powers surrendered by the Constitution of the United States, the people of the several states are absolutely and unconditionally sovereign within their respective territories. It follows that they may impose what taxes they think proper upon persons or things within their dominion, and may apportion them according to their discretion and judgment. They may, if they deem it advisable to do so, exempt certain descriptions of property from taxation, and lay the burden of supporting the government elsewhere. And they may do this

in the ordinary forms of legislation or by contract, as may seem best to the people of the state. There is nothing in the Constitution of the United States to forbid it, nor any authority given to this court to question the right of a state to bind itself by such contracts, whenever it may think proper to make them." *Ohio L. Ins., etc., Co. v. Debolt*, (1853) 16 How. (U. S.) 428.

Under the Articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the states, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the states, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect, and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no

power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the states. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the states commit the exercise of the power. That discretion is restrained only by the will of the people, expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the states as the like power, within the limits of the Constitution, is complete in Congress. *Lane County v. Oregon*, (1868) 7 Wall. (U. S.) 76.

2. Tax on Domestic Corporations.—The exercise of the authority which every state possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income, or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports, or tonnage, or transportation to other states, cannot be regarded as conflicting with any constitutional power of Congress.

Delaware Railroad Tax, (1873) 18 Wall. (U. S.) 232.

3. Concurrent State and Federal Power on the Same Subjects.—Outside of the prohibitions, express and implied, contained in the Federal Constitution, the power of the states to tax for the support of their own governments is coextensive with the subjects within their unrestricted sovereign power, which shows conclusively that the power to tax may be exercised at the same time and upon the same subjects of private property by the United States and by the states without inconsistency and repugnancy. Such a power exists in the United States by virtue of an express grant for the purpose, among other things, of paying the debts and providing for the common defense and general welfare; and it exists in the states for the support of their own governments, because they possessed the power without restriction before the Federal Constitution was adopted, and still retain it, except so far as the right is prohibited or restricted by that instrument.

Ward v. Maryland, (1870) 12 Wall. (U. S.) 428. See also *Concurrent Power of National and State Governments*, 8 FED. STAT. ANNOT. 352.

4. Limited by Grants of Federal Power.—The power of a state to tax its own citizens or their property within its territory cannot be used so as to obstruct

the free course of the power given to Congress. "It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce."

Brown v. Maryland, (1827) 12 Wheat. (U. S.) 448.

V. MATTERS RELATING TO STATE COURTS. — The several state legislatures retain all the powers of legislation, delegated to them by the state constitutions, which are not expressly taken away by the Constitution of the United States. The establishing courts of justice, the appointment of judges, and the making regulations for the administration of justice, within each state, according to its laws, on all subjects not intrusted to the federal government, is the peculiar and exclusive province and duty of the state legislatures.

Calder v. Bull, (1798) 3 Dall. (U. S.) 388.

VI. AS TO RIGHTS OF PROPERTY. — The powers reserved to the several states extend to all the objects which, in the ordinary course of affairs, concern property and the rights of property of individuals, as well as to the internal order, improvement, and prosperity of the state.

King v. American Transp. Co., (1859) 1 Flipp. (U. S.) 1, 14 Fed. Cas. No. 7,787.

VII. SHORES OF, AND SOILS UNDER, NAVIGABLE WATERS. — The shores of navigable waters, and the soils under them, were not granted by the Constitution of the United States, but were reserved to the states respectively.

Pollard v. Hagan, (1845) 3 How. (U. S.) 212. See also *Ownership and Grants of Shores and Tide-water Lands*, 8 FED. STAT. ANNOT. 476.

VIII. MANDAMUS FROM STATE COURT TO FEDERAL OFFICER. — A state court cannot issue a mandamus to an officer of the United States. "There is but one shadow of a ground on which such a power can be contended for, which is, the general rights of legislation which the states possess over the soil within their respective territories. It is not now necessary to consider that power, as to the soil reserved to the United States, in the states respectively. The question in this case is, as to the power of the state courts over the officers of the general government, employed in disposing of that land, under the laws passed for that purpose. And here it is obvious that he is to be regarded either as an officer of that government, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him; since, whatever doubts have from time to time been suggested, as to the supremacy of the United States, in its legislative, judicial, or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way."

McClung v. Silliman, (1821) 6 Wheat. (U. S.) 604.

IX. TAXATION BY CONGRESS OF MUNICIPAL REVENUE. — The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is

conceded by the uniform decisions of the Supreme Court of the United States and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the federal government.

U. S. v. Baltimore, etc., R. Co., (1872) 17 Wall. (U. S.) 327, where the court further said that a municipal corporation is a portion of the sovereign power of the state, and is

not subject to taxation by Congress upon its municipal revenue. The revenue must be municipal in its nature to entitle it to the exemption.

X. RESTRAINING STATE CORPORATION FROM INTERFERING WITH INTERSTATE COMMERCE. — To restrain a state corporation from interfering with the free course of trade and commerce among the states, in violation of an Act of Congress, is not hostile to the reserved rights of the states.

Northern Securities Co. v. U. S., (1904) 193 U. S. 346.

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AMENDMENT XI.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."¹

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¹ This amendment was proposed by joint resolution of Congress adopted on Sept. 5, 1794, 1 Stat. at L. 402; and was declared in a message from the President to Congress, dated Jan. 8, 1798, to have been ratified by the legislatures of three-fourths of the states.

The amendment was passed in consequence of the decision of *Chisholm v. Georgia*, (1793) 2 Dall. (U. S.) 419, holding that a state could be sued by a citizen of another state in assumpsit.

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I. SUITS BY CITIZENS OF SAME STATE. — A suit against a state by one of its own citizens, the state not having consented to be sued, is unknown to and forbidden by the law, as much so as suits against a state by citizens of another state of the Union, or by citizens or subjects of foreign states.

Fitts v. McGhee, (1899) 172 U. S. 524.

II. SUITS BETWEEN STATES. — While this amendment took from the Supreme Court of the United States all jurisdiction, past, present, and future, of all controversies between states and individuals, it left its exercise over those between states as free as it had been before.

Rhode Island v. Massachusetts, (1838) 12 Pet. (U. S.) 731.

Between a State and a Foreign State. — The amendment does not comprehend controversies between two or more states, or between a state and a foreign state.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 406.

III. SUITS AGAINST MUNICIPAL CORPORATIONS. — A suit against a municipal corporation is not a suit against "one of the United States" within the meaning of this amendment. That such a corporation is the agent of the state government is undoubtedly true, but it does not follow therefrom that a suit against it or its officers in such a suit.

Camden Interstate R. Co. v. Catlettsburg, (1904) 129 Fed. Rep. 422.

IV. SUITS AGAINST COUNTIES. — This amendment is limited to those suits in which a state is a party on the record, and does not prohibit suits against counties.

Lincoln County v. Luning, (1890) 133 U. S. 530.

V. SUIT IN ADMIRALTY. — A mere personal suit against a state to recover proceeds in its possession cannot be commenced in the United States Supreme Court. Admiralty process cannot issue when it is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person.

Ex p. Madrazzo, (1833) 7 Pet. (U. S.) 627.

VI. EQUAL PROTECTION OF THE LAWS. — This provision of the Constitution does not involve any denial to any person of the equal protection of the law as contemplated in the Fourteenth Amendment.

Alabama v. Wolfe, (1883) 18 Fed. Rep. 839.

VII. WHEN A STATE HOLDS CORPORATION STOCK — 1. **In General.** — In a suit against a corporation, an objection that a state is a member of a corporation cannot be sustained. If the state be not necessarily defendant, though its

interest may be affected by the decision, the courts of the United States are bound to exercise jurisdiction.

Louisville, etc., R. Co. v. Letson, (1844) 2 How. (U. S.) 550. See also U. S. Bank v. Planters Bank, (1824) 9 Wheat. (U. S.) 904.

When a state becomes a stockholder in a corporation she lays down her sovereignty so

far as respects the transactions of the corporation, and may be made a party defendant to a suit as to matters relating to the corporate interests. Southern R. Co. v. North Carolina R. Co., (1897) 81 Fed. Rep. 600.

When the State Becomes the Sole Proprietor of the Stock of a bank, it cannot be successfully contended that a suit against the bank for money had and received, instituted to recover the amount of a deposit, is one against a sovereign state.

Kentucky Bank v. Wister, (1829) 2 Pet. (U. S.) 322.

2. Suit to Establish Lien on Stock Held by the State.—The state of North Carolina subscribed for part of the capital stock of a railroad company, a corporation created by a state statute, and in order to raise money to pay for this stock bonds of the state were issued under the authority of the same statute. The stock held by the state was represented in the meetings of the stockholders by a proxy appointed by the governor of the state, by virtue of the charter of the railroad company. A suit was brought by a holder of some of the bonds to establish a lien on behalf of the complainant and other bondholders on the stock held by the state and the dividends thereon, in which the railroad company, the state proxy, and the state treasurer were made defendants. It was held that the state was an indispensable party to any proceeding in equity in which its property was sought to be taken and subjected to the payment of its obligations, and that consequently the suit could not be maintained.

Christian v. Atlantic, etc., R. Co., (1890) 133 U. S. 234.

VIII. SUITS ON STATE CONTRACTS — 1. In General.—Those who deal in bonds and obligations of a sovereign state are aware that they must rely altogether on the sense of justice and good faith of the state, and the courts of the United States are expressly prohibited from exercising such jurisdiction.

Washington Bank v. Arkansas, (1857) 20 How. (U. S.) 530.

Distinction between contracts of state with individuals and between individual parties.—“The Eleventh Amendment to the Constitution operates to create an important distinction between contracts of a state with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. That obligation, by virtue of the provision of Article I., section 10, of the Constitution of the United States, cannot be impaired by any subsequent state legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a state. In respect to

these, by virtue of the Eleventh Amendment to the Constitution, there being no remedy by a suit against the state, the contract is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense.” *In re Ayers*, (1887) 123 U. S. 504, wherein the court further said: “The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should

be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the adminis-

tration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."

2. Suit to Compel Enforcement of Statutory Remedy. — A suit against the executive officers of a state in their official capacity to compel them to enforce the provisions of a statute appropriating certain taxes for the purpose of paying bonds and coupons issued under the statute, when the state, by an amendment to its constitution, has undertaken to prohibit them from doing so, cannot be maintained. Such a supposed remedy implies power in the judiciary to compel the state to abide by and perform its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the state to the extent that may be necessary to accomplish the end in view.

Louisiana v. Jumel, (1882) 107 U. S. 722.

3. Suit to Restrain Acts Constituting Breach of Contracts. — A bill, the object of which is by injunction indirectly to compel the specific performance of a contract, by forbidding all those acts and doings which constitute breaches of the contract, must necessarily be a suit against the state. In such a case, though the state be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance though not in form, a suit against the state.

In re Ayers, (1887) 123 U. S. 502.

IX. SUIT FOR MONEY IN THE STATE TREASURY. — A suit on a demand for money actually in the state treasury, mixed up with the general funds of the state, the possession of which was acquired by means which it was lawful for the state to exercise, cannot be maintained under this amendment.

Sundry African Slaves v. Madrazo, (1828) 1 Pet. (U. S.) 110.

X. "COMMENCED OR PROSECUTED." — A defendant who removes a judgment rendered against him by a state court into the Supreme Court of the United States, for the purpose of re-examining the question whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the state.

Cohen v. Virginia, (1821) 6 Wheat. (U. S.) 412.

XI. STATE AS A NOMINAL OR REAL PARTY. — That the state is not named as a party defendant is not conclusive of the question whether the state is a party. Whether it is the actual party in the sense of the prohibition of the Constitution must be determined by a consideration of the nature of the case as presented on the whole record.

In re Ayers, (1887) 123 U. S. 492, wherein the court said: "It must be regarded as a settled doctrine of this court, established

by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always de-

terminated by reference to the nominal parties on the record.' *Poindexter v. Greenhow*, (1884) 114 U. S. 270, 287. This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738, 857. In his opinion in that case he said: 'It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a state by the citizens of another state or by aliens.' And the point as involved in that case was stated by Mr. Justice Swayne, delivering the opinion of the court in *Davis v. Gray*, (1872) 16 Wall. (U. S.) 203, 220, as follows: 'In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.' But what was said by Chief Justice Marshall in *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738, must be taken in connection with its immediate context, wherein he adds (page 858): 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.' This conveys the intimation, that where the defendants who are sued as officers of the state, have not a real, but merely a nominal interest in the controversy, the state appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not

fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject-matter."

The question whether a particular suit is one against the state within the meaning of the Constitution must depend upon the same principles that determine whether a particular suit is one against the United States. *Tindal v. Wesley*, (1897) 167 U. S. 213.

"It was at one time held that the Eleventh Amendment to the Constitution of the United States, which provides that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state,' was applicable only to cases in which the state was named in the record as a party defendant. *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the state, when 'the state, though not named, is the real party against which relief is asked, and the judgment will operate.' *In re Ayers*, (1887) 123 U. S. 443." *Minnesota v. Hitchcock*, (1902) 185 U. S. 386.

Old doctrine overruled.—"It may, we think, be laid down as a rule which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record." *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738. See also *Davis v. Gray*, (1872) 16 Wall. (U. S.) 203. But see *Chicago, etc., R. Co. v. Dey*, (1888) 35 Fed. Rep. 869, in which case the court said: "But recent cases set aside that rule, and establish a more reasonable one—that that amendment covers not only suits brought against the state by name, but those against its officers, agents, and representatives, where the state, though not named as defendant, is the real party against which relief is asked, and the judgment will operate."

Question Belongs to Merits Rather than Jurisdiction.—The question whether a suit against individuals is a suit against a state within the meaning of this amendment is one which belongs to the merits rather than to the jurisdiction.

Illinois Cent. R. Co. v. Adams, (1901) 180 U. S. 37.

XII. SUITS AGAINST STATE OFFICERS — 1. In General.—This amendment covers "not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In re Ayers, (1887) 123 U. S. 505, in which case the court said that the rule that the amendment covers not only suits brought

against a state by name, but those also against its officers where the state, though not named, is the only real party against which alone

in fact the relief is asked, does not impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest. See also *North Carolina v. Temple*, (1890) 134 U. S. 30.

The fact that a suit is against the officials of a state does not necessarily show that the action is within the prohibition of the Eleventh Amendment, as being, in essence, a suit against a state, but that in determining that question regard must be had to the substance of the relief sought. If the purpose of the action is to secure protection to property or to personal or contract rights against injurious attacks thereon by state officials in seeking to enforce an unconstitutional law, the federal courts will not be debarred from taking jurisdiction simply because the de-

fendants are in fact state officials. *Manchester F. Ins. Co. v. Herriott*, (1899) 91 Fed. Rep. 715.

Officers performing special duty.—A statute created a court of visitation with full power to regulate the operation of railroad and telegraph companies, and to prescribe schedules of rates and charges, and with the power to pass judicially upon its regulations, and the reasonableness of rates fixed by it, and to embody its determination in decrees, which it was authorized to enforce by the appointment of receivers and the sequestration of the property of the companies. The officials upon whom was cast the special duty of administering these laws, the offices being created solely for such purposes, are not general officers of the state whose duty it is to see to the enforcement of the laws generally, and who act only by formal judicial proceedings in the courts of the state. A suit, therefore, against such officers, is not against the state, and hence is not within the prohibition of this amendment. *Western Union Tel. Co. v. Myatt*, (1899) 98 Fed. Rep. 360.

2. State Governor Sued Officially.—Where a governor is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record.

Sundry African Slaves v. Madrazo, (1828) 1 Pet. (U. S.) 110.

3. To Test Constitutionality of Statute.—There is a wide difference between a suit against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officials will act only by formal judicial proceedings in the courts of the state.

Fitts v. McGhee, (1899) 172 U. S. 529.

4. To Compel Officer to Perform His Duty.—When a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ.

Board of Liquidation v. McComb, (1875) 92 U. S. 541, *affirming* (1874) 2 Woods (U. S.) 49, 15 Fed. Cas. No. 8707. See also *Mutual L. Ins. Co. v. Boyle*, (1897) 82 Fed. Rep. 705; *Chaffraix v. Board of Liquidation*, (1892) 11 Fed. Rep. 638.

A suit against a state officer to compel him to do what a statute requires of him, is a suit against the officer and not against the state. *Rolston v. Missouri Fund Com'rs*, (1887) 120 U. S. 411. But in *McCauley v. Kellogg*, (1874) 2 Woods (U. S.) 13, 15 Fed. Cas. No.

§ 688, it was held that an injunction against state officers, in their official capacity, on the suit of holders of state bonds, to require the state officers to comply with and specifically perform the contracts of the state, by setting apart the funds agreed therein to be set apart; by estimating the amount of tax required to comply with said contracts; by collecting the

same, as provided by said contracts; by depositing and holding the proceeds of the same according to said agreements, and by paying the interest on said bonds as it should mature, and redeeming the principal thereof according to said agreements, could not be maintained.

5. To Recover Money Unlawfully Taken.— Where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, such suit is not, within the meaning of the amendment, an action against the state.

Scott v. Donald, (1897) 165 U. S. 68. See also Scott v. Donald, (1897) 165 U. S. 107, amending decree and affirming Donald v.

Scott, (1895) 67 Fed. Rep. 854, (1896) 74 Fed. Rep. 859.

6. To Recover Taxes Paid upon Alleged Illegal Levy.— A suit, though in form against an officer of the state, is against the state itself within the meaning of this provision when it is brought under a state statute against the state treasurer for the recovery of taxes paid upon an alleged illegal levy. "This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question — as between the parties actually before the court — because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. In the present case the action is not to recover specific moneys in the hands of the state treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the state to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the state from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the state, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment."

Smith v. Reeves, (1900) 178 U. S. 436, affirming Smith v. Rackliffe, (C. C. A. 1898) 87 Fed. Rep. 964.

7. To Compel Acceptance of Tax-receivable Coupons.— An action against a state officer to compel the acceptance of tax-receivable coupons, the validity of which is denied by the state, is substantially within the prohibition of this amendment, as the state is not only the real party to the controversy but the real party against which relief is sought by the statute.

Hagood v. Southern, (1886) 117 U. S. 67, wherein the court said: "A broad line of demarcation separates from such cases as the present, in which the decrees require by

affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or

suits in equity are maintained against defendants who, while claiming to act as officers of the state, violate and invade the per-

sonal and property rights of the plaintiffs, under color of authority, unconstitutional and void."

8. To Set Aside Tax Sale When State Was Purchaser.— A state statute providing that "the auditor-general shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, or for the purpose of setting aside any taxes returned to him and for which sale has not been made," cannot be construed as expressing a waiver by the state of its constitutional immunity from suit in a United States court, and a suit cannot be maintained in a federal court against a state auditor-general and a county treasurer to set aside tax sales as void, where the state was the purchaser, and was a necessary party to the suit.

Chandler v. Dix; (1904) 194 U. S. 591.

9. To Recover Possession of Land.— An action brought against individuals to recover the possession of land of which they have actual possession and control, is not an action against the state within the meaning of the Constitution simply because those individuals claim to be in rightful possession as officers or agents of the state, and assert title and right to possession in the state. Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question.

Tindal v. Wesley, (1897) 167 U. S. 212.

10. For Foreclosure of Mortgage on Property Held by the State.— A bill filed against the governor of a state, the state treasurer, and the directors of a railroad company, no one of whom has any personal interest in the matter or any official authority to grant the relief asked, for the foreclosure of a mortgage and other equitable relief, of which properties the state has the legal title and is in the actual possession, is a suit in which the state is an indispensable party and the only proper defendant, and cannot be maintained.

Cunningham v. Macon, etc., R. Co., (1883) 109 U.S. 447, wherein the court said: "While no attempt will be made here to do this [reconcile all the decisions of the court in this class of cases], it may not be amiss to try to deduce from them some general principles, sufficient to decide the case before us. It may be accepted as a point of departure unquestioned, that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution. This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice, which in many cases the courts can see will be defeated by an unwarranted exten-

sion of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration. 1. It has been held in a class of cases where property of the state, or property in which the state has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the government, the court will proceed to discharge its duty in regard to that property. And the state, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be sub-

jected in like manner to the judgment of the court. * * * 2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. * * * 3. A third class, which has given rise to more

controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public officers. * * * But in all such cases, from the nature of the remedy by mandamus, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer."

11. Injunctions Against State Officers — a. TO RESTRAIN ENFORCEMENT OF UNCONSTITUTIONAL STATUTE. — A suit against individuals, for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of this amendment.

Prout v. Starr, (1903) 188 U. S. 543, wherein the court said: "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war — all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of the state laws disregarding these constitutional limitations. Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the Fourteenth Amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several states, in proper cases, the immunity intended by the Eleventh Amendment." See also *Smyth v. Ames*, (1898) 169 U. S. 518, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165; *Davis v. Gray*, (1872) 16 Wall. (U. S.) 220; *Pittsburg Third Nat. Bank v. Mylin*, (1896) 76 Fed. Rep. 385; *Preston v. Walsh*, (1882) 10 Fed. Rep. 315; *Astrom v. Hammond*, (1842) 3 McLean (U. S.) 107, 2 Fed. Cas. No. 596. But see *Arbuckle v. Blackburn*, (C. C. A. 1902) 113 Fed. Rep. 624, *appeal dismissed* (1903) 191 U. S. 405.

It is the duty of the United States court to restrain a state officer from exercising an un-

constitutional statute of the state, when the execution of it by him would violate or abridge the rights, privileges, and immunities of the complainant that are guaranteed by the Constitution of the United States. So far as this question is concerned, it is immaterial if the officer so restrained be the supervisor of registration, the auditor of the state, the comptroller-general, the treasurer, the attorney-general, or the governor. The Constitution of the United States is the supreme law of the land, anything in the constitution or laws of any of the states to the contrary notwithstanding. *Mills v. Green*, (1895) 67 Fed. Rep. 818.

For protection of United States bank. — It was held that the Circuit Courts of the United States had jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which were threatened to be invaded under the unconstitutional laws of a state, and as the state itself could not, under this amendment, be made a party to the suit, it might be maintained against the officers and agents of the state who were intrusted with the execution of such laws. *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738. See also *Tyler v. Walker*, (1851) 2 Hayw. & H. (D. C.) 35, 24 Fed. Cas. No. 14,311a.

A suit in which a prosecuting attorney is a party defendant, brought to enjoin the enforcement of an alleged unconstitutional statute, is not as to him a suit against the state within the meaning of this amendment. *Central Trust Co. v. Citizens' St. R. Co.*, (1897) 82 Fed. Rep. 1.

A suit against a county attorney to stay him from taking any further action looking to the employment of the instrumentalities of the state to enforce against the complainant a dormant interlocutory decree of the state court, which he is not required to invoke, because its enforcement would be violative of the constitutional rights of the petitioner, is not a suit against the state. "Being advised, as he is, by the decision of

the Supreme Court of the United States in the *Ioua* case, as also by the decision of the United States circuit judge, that the proceeding against the petitioner is in the face of the supreme law of the land, he can be under no possible obligation of official duty or good citizenship to make further attempt to enforce the dormant order of injunction; and his threatened purpose to do so, in this view,

is a seeming defiance of law, and a menace to the liberty of the petitioner, and of his right to pursue a lawful business. In such conjecture, it seems to me, it would be unjust to the state that it could be deemed a party to be restrained from such wanton and unauthorized prosecution." *Tuchman v. Welch*, (1890) 42 Fed. Rep. 552.

b. FROM CERTIFYING ALLEGED ILLEGAL TAX VALUATION. — An action against a state auditor to restrain him from certifying and transmitting to the several county auditors of the state the valuations of the property of the complainant in such counties, for the purpose of taxation as fixed by the state board of tax commissioners under a statute alleged to be unconstitutional, and which, if committed, would wrongfully and to its irreparable injury create an apparent charge and lien upon the complainant's property, in violation of its right to security of property guaranteed to it by the Constitution, is not an action against the state within the meaning of this amendment.

Western Union Tel. Co. v. Henderson, (1895) 68 Fed. Rep. 589, wherein the court said: "From this review, it will be seen that while there has not always been harmony in the views of the judges, nor in the decisions of the court, touching the true meaning of the Eleventh Amendment, it has never been doubted or denied since the decision in the case of *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738, that the Circuit Courts of the United States were invested with jurisdiction and power to restrain an officer of the state from committing tortious or wrongful acts, violative of the personal or property rights of a party, where such acts are committed under and pursuant to the pretended authority of an unconstitutional statute."

A suit against a state auditor, seeking to restrain him from certifying an alleged illegal valuation and assessment to the clerks of the several counties as a basis for further local taxation, is not one against the state but against the defendant as an individual. *Coulter v. Weir*, (C. C. A. 1904) 127 Fed. Rep. 902, in which case the court said that while it has been frequently maintained that suits to enjoin state officers from doing acts under color of an unconstitutional law or an illegal assessment under a valid law, are not suits against the state; the ground upon which all such cases rest is that the officers sued were illegally about to do some act or take some step under color of the law of the state in violation of the rights of complainant and for which the defendant would be personally liable.

c. TO RESTRAIN EQUALIZATION BOARD FROM EXECUTING TAX LAW. — A suit against the members of a state board of equalization, to enjoin them from executing a taxing law of the state against complainant in such a manner that, in view of the mode in which other taxing laws are executed against a large part of the taxable property of the state, the defendants will impose upon complainant an illegal burden, in violation of its right under the state constitution to pay only an equal share of the taxes in proportion to the value of its property, is not a suit against the state. It is a suit against individuals, seeking to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers to be without lawful authority.

Taylor v. Louisville, etc., R. Co., (C. C. A. 1898) 88 Fed. Rep. 356.

d. TO RESTRAIN CORPORATION COMMISSIONERS FROM ENFORCING UNLAWFUL ORDER — (1) *In General.* — A suit against state railroad commissioners brought by a railroad company to enjoin them from putting in force a certain schedule of rates prepared by them for all transportation within the limits of

the state, is not a suit against the state. No contract of the state is involved in litigation; no judgment can be rendered which affects it as a corporate entity; and it is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation which is involved in this inquiry is governmental in its nature, not contractual.

Chicago, etc., *R. Co. v. Dey*, (1888) 35 Fed. Rep. 866. See also Chicago, etc., *R. Co. v. Becker*, (1888) 35 Fed. Rep. 883.

A bill in equity may be maintained to enjoin a state corporation commission from

bringing suits for penalties and damages for failure to comply with an order of the commission alleged to violate the rights of the complainant in the conduct of its interstate business. *Southern R. Co. v. Greensboro Ice, etc., Co.*, (1904) 134 Fed. Rep. 82.

(2) *From Enforcing Unreasonable Rates.* — An action against state railroad commissioners, alleging the unreasonableness of rates established by the commission and praying a decree restraining the commission from enforcing those rates, is not a suit against the state. The state has no interest in a pecuniary sense, but going back of all matters of form, the only parties pecuniarily affected are the shippers and carriers.

Reagan v. Farmers' L. & T. Co., (1894) 154 U. S. 390, wherein the court said: "Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law

will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

A suit in equity by receivers of a railroad company for relief against the action of state railroad commissioners in changing freight transportation rates, and establishing new rates, is not a suit against the state. The fact that, under the operation of a state dispensary act, the state is engaged in the business of distributing and selling liquors, and that it is a large, perhaps the only, shipper, and has a material interest in the question, and the action of the commissioners complained of is in the change of rates for transportation of liquors in glass, does not make the state a party to the suit. *Clyde v. Richmond, etc., R. Co.*, (1893) 57 Fed. Rep. 436.

e. *TO RESTRAIN IMPAIRMENT OF CONTRACT.* — A complainant had, under an existing statute of Oregon, acquired a described tract of swamp or overflowed land belonging to the state. A subsequent statute declared certificates of sale of such land on which twenty per cent. of the purchase price was not paid prior to a named date to be void, and required the board of commissioners to cancel them. The board threatened to sell the land described in the plaintiff's certificate. After holding that the new statute under which the board was proceeding to act impaired the contract theretofore made with the complainant, and that, under the facts of the case, he had a vested right to the land, the court held that a suit in equity brought by him against the members of the board to restrain them from selling the tract to which he had acquired an equitable right, was not a suit against the state.

Pennoyer v. McConnaughy, (1891) 140 U. S. 8, wherein the court said that as to whether a suit against state officers is or is not a suit against the state, two classes of cases have appeared "and it is in determining to which class a particular case belongs that differing views have been presented. The first class is

where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *In re Ayers*, (1887) 123 U. S. 443; *Louisiana*

v. Jumel, (1882) 107 U. S. 711; *Antoni v. Greenhow*, (1882) 107 U. S. 769; *Cunningham v. Macon, etc., R. Co.*, (1883) 109 U. S. 446; *Hagood v. Southern*, (1886) 117 U. S. 52. The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction

to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial — is not, within the meaning of the Eleventh Amendment, an action against the state. *Osborn v. U. S. Bank*, (1824) 9 Wheat. (U. S.) 738; *Davis v. Gray*, (1872) 16 Wall. (U. S.) 203; *Tomlinson v. Branch*, (1872) 16 Wall. (U. S.) 460; *Litchfield v. Webster County*, (1879) 101 U. S. 773; *Allen v. Baltimore, etc., R. Co.*, (1884) 114 U. S. 311; *Board of Liquidation v. McComb*, (1875) 92 U. S. 531; *Poindexter v. Greenhow*, (1884) 114 U. S. 270." *Affirming McConnaughy v. Pennoyer*, (1890) 43 Fed. Rep. 196, 339.

f. FROM PREVENTING CORPORATIONS DOING BUSINESS IN THE STATE.

A bill was brought by several foreign insurance companies against the treasurer and auditor of the state of Iowa for the purpose of testing the constitutionality of an Iowa statute which, in substance, provides that all insurance companies incorporated under the laws of a state or nation other than the United States shall, at the time of making the annual statements as required by law, pay into the state treasury three and one-half per cent. of the gross amount of premiums received for business done in the state of Iowa during the preceding year; that all insurance companies incorporated under the laws of a sister state of the Union shall pay into the treasury two and one-half per cent. of the gross amount of premiums received during the preceding year, and that all insurance companies incorporated under the laws of the state of Iowa, not including county, mutual, and fraternal beneficiary associations, shall pay into the treasury one per cent. of the gross amount received from premiums and assessments after deducting amounts paid for losses and premiums returned, it being further provided

that upon payment of the proper sums duplicate receipts therefor should be issued, one of which must be filed with the auditor of the state, who is then authorized to issue the annual certificate requisite to enable the company to continue in business during the coming year. The real purpose of the bill was to compel the state, through its officials, to recognize the right of complainants to continue in business in the states without the payment of the tax, and was a case over which, under this amendment, the court had no jurisdiction. *Manchester F. Ins. Co. v. Harriott*, (1899) 91 Fed. Rep. 713.

A suit by an insurance company against the attorney-general and the superintendent of insurance to enjoin them from interfering with the transaction of its business in that state, and to procure an adjudication that it was entitled to a certificate authorizing it to carry on business therein, is not a suit against the state when it concerns a plain official duty, requiring no exercise of discretion. *Mutual L. Ins. Co. v. Boyle*, (1897) 82 Fed. Rep. 705.

g. TO PREVENT INFRINGEMENT OF COPYRIGHT. — A suit to enjoin the publication of a collection of state statutes, compiled under the authority of a statute, on the ground that its publication would infringe the copyright of an arrangement of the statutes previously published, is not a suit against the state within the meaning of this amendment.

Howell v. Miller, (C. C. A. 1898) 91 Fed. Rep. 135, wherein the court said: "A state cannot authorize its agents to violate a citizen's right of property, and then invoke the

Constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents."

h. TO RESTRAIN LOCATION OF LANDS CLAIMED. — A suit against the commissioner of the general land office of a state, praying for an injunction to restrain the defendant from allowing a location or survey of lands lying within the limits of a colony not yet patented, and from issuing any patent or grant of lands within such limits, except to the complainants, was held not to be a suit against the state, but against an officer of the state, who, it was alleged, without the authority of any valid law of the state, was, by an unwarranted

assumption of power, so using his official permission as to invade rights secured to complainant by the Constitution and laws of the United States.

Hancock v. Walsh, (1879) 3 Woods (U. S.) 351, 11 Fed. Cas. No. 6,012.

i. **TO RESTRAIN DIVERSION OF EDUCATIONAL FUND.** — The complainant, president, etc., of Yale College, brought a suit in equity against the state treasurer of the state of Connecticut, to prevent a threatened diversion from complainant of the income of the "Agricultural College Fund," created by the Act of Congress, accepted, and set apart by the state for the use and endowment of the college. "The title which the college has to the fund is a vested beneficial right in a separate parcel of securities, capable of as exact description as the boundaries of a tract of land, and the college is entitled to its preventive remedy by an injunction to restrain the defendant from paying the income of the land-scrip fund to any other person than itself; but it does not necessarily follow that, under this bill in equity, the complainant is entitled to affirmative relief, because affirmative relief, viz., a decree that he should pay the income to the complainant, may be considered an attempt to compel the state to execute its contracts, and the power of the court may be regarded as exhausted when it prevent an officer from invading the property rights of the complainant."

Yale College v. Sanger, (1894) 62 Fed. Rep. 177. But see *Brown University v. Rhode Island College*, etc., (1893) 56 Fed. Rep. 55.

XIII. WAIVER OF IMMUNITY — 1. In General. — The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states.

Clark v. Barnard, (1883) 108 U. S. 447.

2. Right of State to Intervene. — The right of a state to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant.

U. S. v. Peters, (1809) 5 Cranch (U. S.) 115.

AMENDMENT XII.

“ The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;— The president of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;— The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.”

This Amendment Was Proposed to the legislatures of the several states by joint resolution of Congress adopted on Dec. 12, 1803; and was declared in a proclamation of the secretary of state of Sept. 25, 1804, to have been ratified by the legislatures of three-fourths of the states.

The Amendment Supersedes the original clause 3 of section 1 of Article II.

The State Acts Individually Through Its Electoral College, although, by reason of the power of its legislature over the manner of appointment, the vote of its electors may be divided.

McPherson v. Blacker, (1892) 146 U. S. 27.

In Case of Election by the House of Representatives, the state acts as a unit and its vote is given as a unit, but that vote is arrived at through the votes of its representatives in Congress elected by districts.

McPherson v. Blacker, (1892) 146 U. S. 26.

AMENDMENT XIII., SECTION 1.

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."¹

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2. *Slaves of the Chickasaw Nation*, 377.
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II. RIGHT TO RECOVER PRICE OF A SLAVE, 377.

III. SLAVERY AND INVOLUNTARY SERVITUDE, 377.

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7. *Contract of a Seaman*, 380.

I. SLAVERY ABOLISHED BY THE AMENDMENT — 1. In General. — This section is simply a limitation upon the power of a state to establish slavery or reduce any one to a state of slavery or involuntary servitude.

People v. Brady, (1870) 40 Cal. 216.

The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws. *Civil Rights Cases*, (1883) 109 U. S. 24.

While it cannot be said that no one but the negro can share in the protection of this amendment, yet in any fair construction of any section or phrase it is necessary to look to the purpose which was the pervading spirit of these amendments, the evil which they

were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it. *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 72.

The amendment reversed and annulled the original policy of the Constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disabilities should attach to those of the servile race within its limits. *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151.

This amendment was to prevent any question in the future as to the effect of the war

¹ This amendment was proposed to the legislatures of the several states by joint resolution of Congress, dated Feb. 1, 1865, 13 Stat. L. 567, and by proclamation of the secretary of state, of Dec. 18, 1865, 13 Stat. L. 774, was declared to have been ratified by the following twenty-seven states: Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia.

and the President's proclamation of emancipation upon slavery; and its obvious purpose was to forbid all shades and conditions of African slavery. It had no other office, and its real effect was more for the future than for the present. As to the matter of social and political rights, the African was left subject to all the inconveniences and burdens incident to his color and race, except his former one of servitude. He was a person whose place and office, in the body politic, was yet to be designated and established. *Cory v. Carter*, (1874) 48 Ind. 347.

This amendment abolished slavery only; it did no more. It gave the freedman no right of protection from the federal government superior to that of his white fellow citizens, and no exemption from the power of state control which might be exercised against

others. The right of legislation secured to Congress in the amendment was that only of creating penalties for a violation of its provisions, and providing securities against the re-establishment of slavery, either generally or in particular instances. It accords no more authority to enact that he should have the right to vote, to testify, to make contracts, to hold real estate, exercise trade, attend public schools, or any other matter or thing within the limits of a state, than it does to enact the same thing in reference to white men. The utmost effect of this great provision in our Constitution was to make the colored man a citizen, equal before the laws with the race which had enslaved him. *Charge to Grand Jury*, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260. See *Marshall v. Donovan*, (1874) 10 Bush (Ky.) 687.

2. Slaves of the Chickasaw Nation. — By this amendment, and from the date of its proclaimed ratification, Dec. 18, 1865, the existence of slavery was impossible within the United States or any place subject to their jurisdiction, and by the force of that instrument the slaves of the Chickasaw nation became free, and thereafter possessed the same rights incident to all other freemen relative to life, liberty, and property.

U. S. v. Choctaw Nation, (1903) 38 Ct. Cl. 566.

3. Indian Slavery in Alaska. — The buying, selling, and holding slaves, according to the rules and customs of an uncivilized Alaskan race and tribe of Indians, is a violation of this amendment.

In re Sah Quah, (1886) 31 Fed. Rep. 327.

II. RIGHT TO RECOVER PRICE OF A SLAVE. — This amendment does not prohibit recovery on a note given for the price of a slave, which note was valid when made.

Osborn v. Nicholson, (1871) 13 Wall. (U. S.) 662. See also *Holmes v. Sevier*, (1872) 154 U. S. 582; *Boyce v. Tabb*, (1873) 18 Wall. (U. S.) 546; *McElvain v. Mudd*, (1870)

44 Ala. 48; *Richardson v. Thomas*, (1873) 28 Ark. 389; *Roundtree v. Baker*, (1869) 52 Ill. 241; *Blease v. Pratt*, (1872) 3 S. Car. 513.

III. SLAVERY AND INVOLUNTARY SERVITUDE — 1. **Involuntary Servitude** — *a. IN GENERAL.* — That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word "servitude" is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 69.

This amendment had its origin in the previous existence of African slavery. But the generality of its language makes its prohibition apply to slavery of white men as well as that of black men; and also to serfage, vassalage, villanage, peonage, and every other form of compulsory labor to minister to the

pleasure, caprice, vanity, or power of others. *Railroad Tax Cases*, (1882) 13 Fed. Rep. 740.

Term more comprehensive than slavery. — The term "involuntary servitude" is substantially synonymous with slavery, though it may perhaps be regarded as slightly more comprehensive, and as embracing everything under the name of servitude, though not denominated slavery, which gives to one per-

son the control and ownership of the involuntary and compulsory services of another against his will and consent. *Tyler v. Heidorn*, (1866) 46 Barb. (N. Y.) 458.

State statute relating to entry of alien negroes.—A Florida statute relating to bringing a free colored person into that state, whether from another state or from a foreign country, and providing stringent penalties for a violation of its provisions, is in the nature of an internal police regulation, and so far as it is applicable to the case of British subjects of African descent coming directly to Florida from a British port with the intent of forming a permanent settlement within the limits of that state, is not affected by this amendment. Passengers on *The Schooner Dart*, (1868) 12 Op. Atty.-Gen. 414, wherein the attorney-general said: "This amendment dissolved the relation of master and servant which existed in the slave-holding states of this Union; but it does not repeal or modify,

nor was it designed to repeal or modify, any pre-existing legislation which was a regulation of commerce, and which excluded from our borders persons or classes of persons subjects of foreign power." But see *Excluding Certain Classes of Persons*, 8 FED. STAT. ANNOT. 516.

Services for leased land.—This amendment does not embrace contract service of any description, or such as flows from contracts made by a party, or grows out of a contract made by another person in regard to property and connected with its enjoyment, which property such party derives from such other person and personally enjoys. Such service is never involuntary. The party may at any time renounce it. It is connected with the enjoyment of property, and by refusing to accept or to enjoy the property, the party may at all times escape the personal servitude. *Tyler v. Heidorn*, (1866) 46 Barb. (N. Y.) 458.

b. PROHIBITING TENANT LEAVING DURING TERM.—A state statute which makes it a penal offense, where a person who has "contracted in writing to labor for or serve another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with the party furnishing lands, or the lands and teams to cultivate it, either to furnish the labor, or the labor and teams, to cultivate the lands," afterwards, without the consent of the other party, and without sufficient excuse, to be adjudged by the court, "shall leave such other party or abandon said contract, or leave or abandon the leased premises or land as aforesaid," and take employment of a similar nature from another person, without first giving him notice of the prior contract, was held to be unconstitutional. It is plainly violative of the Thirteenth Amendment to the Constitution, and the statute passed, in pursuance thereof, against peonage. It establishes a system of peonage, and uses the arm of the law to keep persons in "a condition of peonage," whenever they "abandon the leased premises," by coercing performance of the "obligation" of contracts of "labor or service" by involuntary service.

Peonage Cases, (1903) 123 Fed. Rep. 691.

c. REQUIRING PHYSICIANS TO REPORT CONTAGIOUS DISEASES.—A municipal ordinance providing that "every physician, or person acting as such, who shall have any patient within the limits of said city sick with small-pox or varioloid or other infectious or pestilential disease, shall forthwith report the fact to the mayor, or to the clerk of the board of health, together with the name of such patient and the street and number of the house where such patient is treated; and in default of so doing shall forfeit and pay not exceeding fifty dollars for each and every such offense," is not invalid as requiring a physician to labor for the benefit of the public without compensation and thus imposing a form of servitude.

State v. Wordin, (1888) 56 Conn. 224.

d. SEPARATE RAILWAY ACCOMMODATIONS. — A statute requiring that “all railway companies carrying passengers in their coaches in this state shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations,” and that “no person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to,” does not violate this clause.

Ex p. Plessy, (1893) 45 La. Ann. 82.

e. HIRING OUT VAGRANTS. — A state vagrancy law, authorizing the hiring out at the county court-house door for six months of all persons defined by the statute as vagrants was held to be invalid as imposing imprisonment, punishment, and involuntary servitude without any charge, proof, or legislative enactment establishing the act to have been a crime.

In re Thompson, (1893) 117 Mo. 83.

f. APPRENTICESHIP OF COLORED CHILD. — An apprenticeship of a colored child, the indenture of which does not give the provisions for the security and benefit of the apprentice which are required by the state laws in indentures of white apprentices, is involuntary servitude within the meaning of this amendment.

Matter of Turner, (1867) 1 Abb. (U. S.) 84, 24 Fed. Cas. No. 14,247.

g. COERCING ALIEN SEAMEN TO LABOR ON AMERICAN VESSELS. — Alien seamen who are being coerced to labor on board an American vessel against their will, without having previously voluntarily entered into a contract binding them to such service, are being subjected to involuntary servitude within the United States in violation of this amendment.

In re Chung Fat, (1899) 96 Fed. Rep. 202.

h. GIVING MONOPOLY TO SLAUGHTER-HOUSE BUSINESS. — A statute incorporating a slaughter-house company prohibited the landing or slaughter of animals intended for food within the city of New Orleans except by the corporation thereby created. It authorized the company to establish and erect within certain territorial limits therein defined, one or more stockyards, stocklandings and slaughter houses, and imposed upon it the duty of erecting a slaughter house of a certain capacity. It declared that the company should have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals should be landed at the stocklandings and slaughtered at the slaughter houses of the company, and nowhere else. It was held that the statute imposed no servitude within the meaning of this amendment.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 63. See *Live-Stock Dealers, etc., Assoc. v. Crescent City Live-Stock, etc., Co.*, (1870) 1 Abb. (U. S.) 388, 15 Fed. Cas. No. 8,408.

2. Recognition of Legal Distinction Between Races. — A state statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

Plessy v. Ferguson, (1896) 163 U. S. 543.

3. Exclusion from Public School. — The mere exclusion of a colored child from a particular school does not assume to remit her to a condition of slavery or involuntary servitude in the sense of the Constitution.

Ward v. Flood, (1874) 48 Cal. 49.

4. Working Out Fines on City Streets. — A municipal ordinance permitting prisoners committed to a city prison for the violation of a by-law or ordinance of the city to be employed by the city marshal at labor either on the streets or public works of the city, being credited one dollar a day on the judgment for each day's work performed, is not in conflict with this article prohibiting slavery and involuntary servitude.

Topeka v. Boutwell, (1894) 53 Kan. 20.

5. Requiring Labor for Repair of Public Highways. — The power to impose labor for the repair of public highways and streets comes within the police regulation of the state or city, and cannot be regarded as falling within the terms of the Constitution prohibiting slavery and involuntary servitude.

In re Dassler, (1886) 35 Kan. 684.

6. Deportation of Alien Resulting in Remanding to Slavery. — This article was relied on as authority for vacating an order for the deportation of a Chinese woman who had been imported into the United States as a slave in violation of the immigration laws and had escaped, when it appeared that the woman had been sold as a slave by her foster mother, in China, and by her purchaser had been brought into the United States for immoral purposes, and a strict compliance with the statute would be equivalent to remanding her to perpetual slavery.

U. S. v. Ah Son, (1904) 132 Fed. Rep. 878.

7. Contract of a Seaman. — The contract of a seaman is not within the spirit of this amendment.

Robertson v. Baldwin, (1897) 165 U. S. 281, wherein the court said: "The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain states of the Union since the foundation of the government, while the addition of the words 'involuntary servitude' were said in the *Slaughter-house Cases*, 16 Wall. 36, to have been intended to cover the

system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional."

AMENDMENT XIII., SECTION 2.

"Congress shall have power to enforce this article by appropriate legislation."

May Be Directed Against Acts of Individuals. — The provisions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the states, but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, and grants to Congress power to enforce this prohibition by appropriate legislation.

Clyatt v. U. S., (1905) 197 U. S. 216.

There is no limitation in this amendment confining the prohibition to the state, but it includes everybody within the jurisdiction of the national government. Congress is therefore authorized by its provision to legislate against acts of individuals as well as of the states in all matters necessary for the pro-

tection of the rights granted by it. *U. S. v. Morris*, (1903) 125 Fed. Rep. 324.

The appropriate legislation which Congress is authorized to enact under this clause is not to be directed solely at state action. There is no such limitation in this as in the Fourteenth Amendment. *U. S. v. McClellan*, (1904) 127 Fed. Rep. 971.

No Power to Establish Police System. — This section does not confer upon Congress any power to establish a police system for the internal government of the state, or by its laws to annul the laws of a state, or to control their operation in any way whatever.

People v. Brady, (1870) 40 Cal. 216.

Power to Prohibit Peonage. — Congress has power under this article to prohibit any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding, and sections 1990 and 5526, R. S., are valid.

Clyatt v. U. S., (1905) 197 U. S. 218, wherein the court said: "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds

another in that condition of involuntary servitude. This legislation is not limited to the territories or other parts of the strictly national domain, but is operative in the states and wherever the sovereignty of the United States extends." See also *U. S. v. McClellan*, (1904) 127 Fed. Rep. 971; *In re Lewis*, (1902) 114 Fed. Rep. 963.

Prohibiting Denial of Admission to Privileges of Public Places. — The denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does not subject that person to any form of servitude, or tend to fasten upon him any badge of slavery within the meaning of this provision, and an Act of Congress declaring that in the enjoyment of such accommodations and privileges no distinction shall be made between citizens of different race or color, or between those who have and those who have not been slaves, finds no sanction in this amendment.

Civil Rights Cases, (1883) 109 U. S. 25.

The abolition of slavery placed the negro in the former slave states just where he had

before stood in the free states. What Congress could not do in reference to a free negro in a northern state, where slavery never existed, before the abolition of slavery, it

could not afterwards do in regard to one living in the south. The Thirteenth Amendment did not authorize Congress to interfere with private and internal regulations of theatre managers, hotel keepers, or common

carriers within the state, in reference to colored persons, any more than it did in regard to their white fellow citizens. *Charge to Grand Jury*, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260.

Legislation Relating to Civil Rights.—Section 5519, R. S., declaring that “if two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; each of such persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment,” is broader than this amendment, and therefore not authorized by it. A law under which two or more white men could be punished for conspiring to deprive another free white man of the right to testify, cannot be based on the amendment which prohibits slavery and involuntary servitude.

Le Grand v. U. S., (1882) 12 Fed. Rep. 578. See also *U. S. v. Harris*, (1882) 106 U. S. 643, wherein the court said: “A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, in which one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder. If, therefore, we hold that section 5519 is warranted by the Thirteenth Amendment, we should, by virtue of that amendment, accord to Congress the power to punish every crime by which the right of any person to life, property, or reputation is invaded. Thus, under a provision of the Constitution which simply abolished slavery and involuntary servitude, we should, with few exceptions, invest Congress with power over the whole catalogue of crimes. A construction of the amendment which leads to such a result is clearly unsound.” And see *Baldwin v. Franks*, (1887) 120 U. S. 684.

“Whatever may have been the unspoken aim of the second section—to secure the only end of the first section, freedom to all and nothing more, was the only constructive object, and is the inevitable effect, of this section. Notwithstanding the abolition of slavery, a state in which ‘freedmen’ reside might attempt their disfranchisement, or withhold from them the privileges of free men. To prevent any such frustration of the aim and effect of the declared emancipation was obviously the object, and must be the only legitimate effect, of the second section. ‘Power to enforce this article by appropriate legislation’ can import nothing more than to uphold the emancipating section, and prevent a

violation of the contemplated liberty of its enfranchised race. It could not mean that Congress should have power to legislate over their civil rights and remedies in the states any more than over those of all other citizens; and it certainly does not squint at any such legislation as to white citizens.” *Bowlin v. Com.*, (1867) 2 Bush (Ky.) 8.

The Act of April 9, 1866, entitled “An Act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication,” was held to be valid as an “appropriate” means of carrying out the object of the first section of this amendment, and a necessary and proper execution of the power conferred by the second section. *U. S. v. Rhodes*, (1866) 1 Abb. (U. S.) 28, 27 Fed. Cas. No. 16,151, wherein the court said: “Without any other provision than the first section of the amendment, Congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needful for that purpose. The second section of the amendment was added out of abundant caution. It authorizes Congress to select, from time to time, the means that might be deemed appropriate to the end. It employs a phrase which had been enlightened by well-considered judicial application. Any exercise of legislative power within its limits involves a legislative, and not a judicial question. It is only when the authority given has been clearly exceeded, that the judicial power can be invoked. Its office, then, is to repress and annul the excess; beyond that it is powerless.” See also *People v. Washington*, (1869) 36 Cal. 658, and *U. S. v. Morris*, (1903) 125 Fed. Rep. 330, in which last-cited case the

court said that Congress has the power under this amendment to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of those privileges is solely on account of his race and color, as a denial of such privileges is an element of servitude within the meaning of this amendment. The rights to lease lands and to accept employment as a laborer for hire are fundamental rights inherent in every free citizen, and a statute under which an indictment may be maintained, charging a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes, is within the constitutional power of Congress under this amendment.

"The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment, after the adoption of which it was re-enacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth

Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings." *Civil Rights Cases*, (1883) 109 U. S. 23.

Disability of negroes as witnesses.—This amendment and the Civil Rights Bill removed the disability of negroes as witnesses. *Handy v. Clark*, (1869) 4 Houst. (Del.) 16. See also *U. S. v. Harris*, (1882) 106 U. S. 640; *Kelley v. State*, (1869) 25 Ark. 392. But see *Bowlin v. Com.*, (1867) 2 Bush (Ky.) 6.

See further as to the guaranties of civil rights, the Fourteenth and Fifteenth Amendments.

AMENDMENT XIV., SECTION 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."¹

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¹ This amendment was proposed to the legislatures of the several states by joint resolution of Congress dated June 16, 1866, 14 Stat. L. 358. On July 21, 1868, Congress adopted and transmitted to the department of state a concurrent resolution declaring that "the legislatures of the states of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several states of the Union, have ratified the Fourteenth Article of Amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore, *Resolved*, that said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the secretary of state." The secretary of state accordingly issued a proclamation, dated July 28, 1868, 15 Stat. L. 708, declaring that the proposed Fourteenth Amendment has been ratified, in the manner hereinafter mentioned, by the legislatures of thirty of the thirty-six states, viz.: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (and the legislature of the same state passed a resolution in April, 1868, to withdraw its consent to it); Oregon, Sept. 19, 1866; Vermont, Nov. 9, 1866; Georgia rejected it Nov. 13, 1866, and ratified it July 21, 1868; North Carolina rejected it Dec. 20, 1866, and ratified it July 9, 1868; New York ratified it Jan. 10, 1867; Ohio ratified it Jan. 11, 1867 (and the legislature of the same state passed a resolution in January, 1868, to withdraw its consent to it); Illinois ratified it Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Missouri, Jan. 26, 1867; Indiana, Jan. 29, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868, and Alabama, July 13, 1868. Georgia again ratified the amendment Feb. 2, 1870. Texas rejected it Nov. 1, 1866, and ratified it Feb. 18, 1870. Virginia rejected it Jan. 19, 1867, and ratified it Oct. 8, 1869. The amendment was rejected by Kentucky, Jan. 10, 1867; by Delaware, Feb. 8, 1867; by Maryland, March 23, 1867, and was not afterward ratified by either state.

I. PURPOSE OF THE CLAUSE — 1. In General. — The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in the courts, as to the citizenship of free negroes, and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the state in which they reside.

Elk v. Wilkins, (1884) 112 U. S. 101. See also *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 73; *Van Valkenburg v. Brown*, (1872) 43 Cal. 47.

The clause as to citizenship was inserted in the amendment not merely as an authoritative declaration of the generally recognized law of the country, so far as the white race is concerned, but also to overrule the doctrine of the *Dred Scott* case, affirming that persons of the African race brought to this country and sold as slaves, and their descendants, were not citizens of the United States, nor capable of being such. The clause changed the entire status of these people. It lifted them from their condition of mere freedmen, and conferred upon them, equally with all other native-born, the rights of citizenship. When it was adopted the naturalization laws of the United States excluded colored persons from becoming citizens, and the freedmen and

their descendants, not being aliens, were without the purview of those laws. So the inability of persons to become citizens under those laws in no respect impairs the effect of their birth, or of the birth of their children, upon the status of either as citizens under the amendment in question. *In re Look Tin Sing*, (1884) 21 Fed. Rep. 909.

"It was held, in the celebrated *Dred Scott* case, by the Supreme Court of the United States, that a man of African descent, whether a slave or not, was not and could not be a citizen of the state or of the United States; and, notwithstanding the criticism to which this adjudication was subjected, it was never overruled; and the primary object of the Fourteenth Amendment was to relieve this race from the disabilities therein declared to be inherent in and inseparable from the African blood." *Marshall v. Donovan*, (1874) 10 Bush (Ky.) 687.

2. Operation Not Limited by the Main Object. — As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. "It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has often been recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in the *Dred Scott* case, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race."

U. S. v. Wong Kim Ark, (1898) 169 U. S. 676, affirming (1896) 71 Fed. Rep. 382. See *Dred Scott v. Sandford*, (1856) 19 How. (U. S.) 393.

II. CLAUSE SELF-OPERATING. — The instantaneous effect of this clause was to make all the persons described in the first section citizens alike of the United States and of the states wherein they lived. It required no legislation by Congress to perfect this right. The amendment itself, of its own force, achieved the object.

U. S. v. Lackey, (1900) 99 Fed. Rep. 955.

III. DISTINCTION BETWEEN RESIDENCE AND CITIZENSHIP. — Residence and citizenship are wholly different things within the meaning of the Constitution

and the laws defining and regulating the jurisdiction of the Circuit Court of the United States.

Steigleder v. McQuesten, (1905) 198 U. S. 143.

Averment of residence does not show jurisdiction. — There is nothing in this clause which requires and justifies a rule that the

bare averment of the residence of the parties is sufficient, *prima facie*, to show jurisdiction when the jurisdiction bears upon the citizenship of the parties. *Robertson v. Cease*, (1878) 97 U. S. 650.

IV. DEFINITION OF "CITIZEN" — 1. In General. — The Constitution nowhere defines the meaning of the word "citizen," either by way of inclusion or exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this respect, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.

U. S. v. Wong Kim Ark, (1898) 169 U. S. 654, *affirming* (1896) 71 Fed. Rep. 382.

2. Corporations Not Citizens. — Citizens of the United States within the meaning of this article must be natural and not artificial persons, and therefore a corporate body is not a citizen of the United States as that term is here used.

Insurance Co. v. New Orleans, (1870) 1 Woods (U. S.) 85, 13 Fed. Cas. No. 7,052.

Corporations may be "persons" within the due process and equal protection clauses, and as such within the provision that no state shall deprive any person of life, liberty,

or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law. They are not, however, citizens within the meaning of this or any other clause in the Constitution. *Fire Dept. v. Stanton*, (1898) 28 N. Y. App. Div. 334.

V. TWO SOURCES OF CITIZENSHIP — BIRTH AND NATURALIZATION. — This section contemplates two sources of citizenship, and two only: birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Elk v. Wilkins, (1884) 112 U. S. 101.

Naturalization of native-born unnecessary. — The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization

can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. *U. S. v. Wong Kim Ark*, (1898) 169 U. S. 702, *affirming* (1896) 71 Fed. Rep. 382.

A negro born in Canada, whose parents were born in Virginia and held there as slaves until they left Virginia and went to Canada in 1834, where from that time they

resided, did not become a citizen of this country by coming to the United States when he was nearly twenty years of age. *Hedgman v. Board of Registration*, (1872) 26 Mich. 51.

Women, if Born of Citizen Parents within the jurisdiction of the United States, have always been considered citizens of the United States, as much so before the adoption of this amendment as since.

Minor v. Happersett, (1874) 21 Wall. (U. S.) 165.

VI. DISTINCTION BETWEEN CITIZENSHIP OF UNITED STATES AND OF A STATE

— **1. In General.** — The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a state, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 73, wherein the court said that this clause declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it over-

turns the *Dred Scott* decision by making all persons born within the United States, and subject to its jurisdiction, citizens of the United States.

2. Clause Reverses Previous Rule of Citizenship. — Prior to the adoption of this amendment, strictly speaking, there were no citizens of the United States, but only of some one of them. Congress had the power "to establish an uniform rule of naturalization," but not the power to make a naturalized alien a citizen of any state. But the states generally provided that such persons might, on sufficient residence therein, become citizens thereof, and then the courts held, *ab convenienti*, rather than otherwise, that they became *ipso facto* citizens of the United States. But the amendment declares the law positively on the subject, and reverses this order of procedure, by making citizenship of a state consequent on citizenship of the United States; for, having declared what persons are citizens of the United States, it does not stop there, and leave it in the power of a state to exclude any such person who may reside therein from its citizenship, but adds, "and such persons shall also be citizens of the state wherein they reside."

Sharon v. Hill, (1885) 26 Fed. Rep. 343.

By the original Constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the Constitution of the United States to

citizens thereof. *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282.

"The Fourteenth Amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially decided to the contrary, that there was no such thing as a citizen of the United States, except as that condition arose from citizenship of some state. No mode existed, it was said, of obtaining a citizenship of the United States, except by first becoming a citizen of some state. This question is now at rest. The Fourteenth Amend-

ment defines and declares who shall be citizens of the United States, to wit, 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The latter qualification was intended to exclude the children of foreign representatives and

the like. With this qualification, every person born in the United States or naturalized is declared to be a citizen of the United States and of the state wherein he resides." *U. S. v. Anthony*, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

3. Right of Person to Choose State Citizenship. — A citizen of the United States is, under the amendment, *prima facie* a citizen of the state wherein he resides, and cannot arbitrarily be excluded therefrom by such state, but he does not become a citizen of the state against his will, and contrary to his purpose and intention to retain an already acquired citizenship elsewhere. The amendment is a restraint on the power of the state, but not on the right of the person to choose and maintain his citizenship or domicile; but it protects him in the exercise of that right by making him a citizen of that state in which he may choose to reside with such intention.

Sharon v. Hill, (1885) 26 Fed. Rep. 344.

VII. "SUBJECT TO THE JURISDICTION THEREOF" — 1. In General. — The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words, besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law, the two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state — both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country.

U. S. v. Wong Kim Ark, (1898) 169 U. S. 682, wherein the court said: "The words 'in the United States, and subject to the jurisdiction thereof,' in the first sentence of the Fourteenth Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of *The Exchange*; and as the equivalent of the words 'within the limits and under the jurisdiction of the United States,' and the converse of the words, 'out of the limits and jurisdiction of the United States,' as habitually used in the naturalization Acts. This presumption is confirmed by the use of the word 'jurisdiction' in the last clause of the same section of the Fourteenth Amendment, which forbids any state to 'deny to any person within its jurisdiction the equal protection of the laws.' It is impossible to construe the words 'subject to the jurisdiction thereof,' in the opening sentence, as less comprehensive than the words 'within its jurisdiction,' in the concluding sentence of the same section; or to hold that persons

'within the jurisdiction' of one of the states of the Union are not 'subject to the jurisdiction of the United States.'" *Affirming* (1896) 71 Fed. Rep. 382.

The word "jurisdiction" must be understood to mean absolute and complete jurisdiction, such as the United States had over its citizens before the adoption of this amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction of the United States only to a limited extent. Political and military rights and duties do not pertain to them. *Expatriation—Foreign Domicile—Citizenship*, (1873) 14 Op. Atty.-Gen. 300.

Excludes children of ministers and consuls. — The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States. *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 73.

They alone are subject to the jurisdiction of the United States who are within their dominions and under the protection of their

laws, and with the consequent obligation to obey them when obedience can be rendered; and only those thus subject by their birth or naturalization are within the terms of the amendment. The jurisdiction over these latter must, at the time, be both actual and exclusive. The words mentioned except from citizenship children born in the United States of persons engaged in the diplomatic service

of foreign governments, such as ministers and ambassadors, whose residence, by a fiction of public law, is regarded as part of their own country. This extraterritoriality of their residence secures to their children born here all the rights and privileges which would inure to them had they been born in the country of their parents. *In re Look Tin Sing*, (1884) 21 Fed. Rep. 906.

2. Child Born of Chinese Parents. — A child born in the United States of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

U. S. v. Wong Kim Ark, (1898) 169 U. S. 653, *affirming* (1896) 71 Fed. Rep. 382.

Chinese persons within the United States (meaning thereby the organized states and territories), and their descendants, when born therein of parents residing here, and not employed in a diplomatic or official capacity under the emperor of China, are citizens of the United States, and, when such fact is established in the mode and manner prescribed by the proper authorities, are entitled to be and remain therein, and are entitled to the equal protection of the laws. *U. S. v. Lee Huen*, (1902) 118 Fed. Rep. 454.

A person born in the United States of Chinese parents is, by the rule of the common law, and by force of this amendment, a citizen of the United States, and in restraint of his or her liberty or locomotion therein, may be delivered therefrom by habeas corpus

by the proper national court. *In re Yung Sing Hee*, (1888) 36 Fed. Rep. 437. See also *Ex p. Chin King*, (1888) 35 Fed. Rep. 354.

When the parents are not engaged in any diplomatic or official capacity under the government of China or other foreign power, a person born in the United States of Chinese parents residing therein is born subject to the jurisdiction of the United States, and he is a citizen thereof, under this amendment. *In re Wy Shing*, (1888) 36 Fed. Rep. 553. See also *In re Look Tin Sing*, (1884) 21 Fed. Rep. 910, wherein the court said that no citizen can be excluded from this country except in punishment of crime.

The amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United States. *State v. Ah Chew*, (1881) 16 Nev. 58.

3. Status of Indians. — An Indian born a member of one of the Indian tribes within the United States is not merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States within the meaning of this clause. "The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life."

Elk v. Wilkins, (1884) 112 U. S. 99. See *Relation of Indians to Citizenship*, (1856) 7 Op. Atty.-Gen. 746; *McKay v. Campbell*, (1871) 2 Sawy. (U. S.) 118, 16 Fed. Cas. No. 8,840.

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the Fourteenth Amendment, is *Elk v. Wilkins*, (1884) 112

U. S. 94, in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized, or taxed, or in any way

recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question. *U. S. v. Wong Kim Ark*, (1898) 169 U. S. 680, *affirming* (1896) 71 Fed. Rep. 382.

A Person Born Off a Reservation, whose father and mother were duly married, the father being a white man and a naturalized citizen of the United States, and the mother being an Indian, and who was reared and educated as the children of other citizens of the United States, is a citizen of the United States.

U. S. v. Hadley, (1900) 99 Fed. Rep. 437.

Indians born of a tribe that no longer keeps up its tribal integrity, and who are liable to taxation in the state of their residence, are, under the Fourteenth Amendment and the Civil Rights Bill of April 9, 1866, citizens of the United States and of such state, and entitled to vote in federal elections. *U. S. v. Elm*, (1877) 25 Fed. Cas. No. 15,048.

An Indian appears to be entitled to the benefit of and to be subject to the laws of the state in which he resides the moment he becomes a citizen of the United States. By virtue of the Fourteenth Amendment a citizen of the United States becomes, by residence therein, a citizen of the state, and entitled to all the rights, privileges, and immunities of other citizens of the state and to the equal protection of its laws. *Matter of Heff*, (1905) 197 U. S. 504.

See the Act of Feb. 3, 1887, sec. 6, ch. 119 (under title *Indians*, 3 FED. STAT. ANNOT. 496), which, as amended by the Act of March 3, 1901, ch. 868, reads as follows: "That upon the completion of said allotments and the patenting of the lands to said

allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

4. Born on Board Foreign Vessel.—Persons born on a public vessel of a foreign country, while within the waters of the United States, and consequently within their territorial jurisdiction, are also excepted. They are considered as born in the country to which the vessel belongs. In the sense of public law, they are not born within the jurisdiction of the United States.

In re Look Tin Sing, (1884) 21 Fed. Rep. 906.

VIII. RIGHT OF SUFFRAGE.—To make a person a citizen is not to make him or her a voter. All that has been accomplished by this amendment was to advance such persons to full citizenship, and clothe them with the capacity to become voters.

Spencer v. Board of Registration, (1873) 1 MacArthur (D. C.) 169.

Women are not given the right to vote under the Fourteenth Amendment to the Con-

stitution, which provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof. *Gougar v. Timberlake*, (1897) 148 Ind. 38.

IX. RIGHT OF EXPATRIATION.—This clause was designed to except from citizenship persons who, though born or naturalized in the United States,

have renounced their allegiance to our government, and thus dissolved their political connection with the country. The United States recognize the right of every one to expatriate himself and choose another country. The English doctrine of perpetual and unchangeable allegiance to the government of one's birth, attending the subject everywhere he goes, has never taken root in this country, although there are judicial dicta that a citizen cannot renounce his allegiance to the United States without the permission of the government, under regulations prescribed by law; and this would seem to have been the opinion of Chancellor Kent, when he published his Commentaries. But a different doctrine prevails now.

In re Look Tin Sing, (1884) 21 Fed. Rep. 906. See also, under the clause granting to Congress the power to establish an uniform

rule of naturalization, 8 FED. STAT. ANNOT. 574.

AMENDMENT XIV., SECTION 1.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

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I. PROHIBITION ON STATE ACTION — 1. In General. — The prohibitions of this section have reference to state action exclusively.

Virginia v. Rives, (1879) 100 U. S. 318. See also the cases cited throughout this division.

The action of a private educational institute in excluding colored pupils does not violate this amendment, though the institute may receive municipal aid. *State v. Maryland Institute*, (1898) 87 Md. 650.

The Chinese Exclusion Act of Congress, of 1892, does not violate this clause, as the inhibitions of this section are laid upon the action of the several states, and have no reference to legislation by Congress. *In re Sing Lee*, (1893) 54 Fed. Rep. 337.

2. On All State Agencies. — These provisions have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.

Ex p. Virginia, (1879) 100 U. S. 347. See also *Chicago, etc., R. Co. v. Chicago*, (1897) 186 U. S. 234; *Scott v. McNeal*, (1894) 154 U. S. 45.

Rights under this amendment turn on the power of the state, no matter by what organ

it acts. *Missouri v. Dockery*, (1903) 191 U. S. 170.

The inhibition of the Fourteenth Amendment is against action by a state depriving an individual of his property. The amendment is to be liberally construed. It is not

to be confined to a legislative act specifically appropriating the property of A or B to some public use. A state acts by agents, and the inhibition runs against all who are in fact such agents, acting within the scope of an authority conferred upon them by the state. *Huntington v. New York*, (1902) 118 Fed. Rep. 686.

State action, to which the prohibitions of the Fourteenth Amendment extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched. *Nashville, etc., R. Co. v. Taylor*, (1898) 86 Fed. Rep. 184.

This Inhibition Reaches the Legislative as well, as the executive and judicial departments. The legislative authority cannot usurp the power to determine what is due process of law, and on the plea of public necessity ignore the well-established safeguards which the law of the land has heretofore recognized and enforced.

Meyers v. Shields, (1894) 61 Fed. Rep. 726.

Municipal ordinances. — While an ordinance, to which the state has not, by delegation of power to the city, given or attempted to give the force of law, will not fall within the constitutional prohibitions, yet a municipal ordinance, passed under supposed and asserted authority delegated by the state, will be regarded as a "law," and is the act of the state within such constitutional inhibitions.

Capital City Gas Co. v. Des Moines, 72 Fed. Rep. 824.

This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. *Ho Ah Kow v. Numan*, (1879) 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546.

Action of Judicial Officers. — A state may not, by any of its agencies, disregard the prohibitions of the amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment. In determining what is due process of law, regard must be had to substance, not to form.

Chicago, etc., R. Co. v. Chicago, (1897) 166 U. S. 234.

A final judgment of a state court construing a state statute so as to make it, although apparently innocuous, actually an interference with property rights, is held to be the act of the state. *Huntington v. New York*, (1902) 118 Fed. Rep. 686, wherein the court said that a state law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid law may so act under it as to work an illegal trespass upon the rights of individuals. In all such cases the officers have acted under the authority actually conferred upon them by the statute, there has been some measure of discretion confided to them, and they have abused such discretion. But when they depart from

the plan laid down by the statute, and whatever trespass they may commit upon private rights, is one which the state has not only not authorized them to commit, but under any fair interpretation of the statute has forbidden them to commit, the protection of this clause cannot be invoked.

The act of a justice of the peace, being an officer of the state, is that of the state, within the inhibition of this amendment. *In re Kelly*, (1890) 46 Fed. Rep. 653.

If compensation for private property taken for public use is an essential element of due process of law, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of the amendment. *Chicago, etc., R. Co. v. Chicago*, (1897) 166 U. S. 235.

Action of Executive and Administrative Officers. — The constitutionality of a statute cannot avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal

trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts.

Reagan v. Farmers' L. & T. Co., (1894) 154 U. S. 390. See also *Railroad, etc., Cos. v. Board of Equalizers*, (1897) 85 Fed. Rep. 317; *Tuchman v. Welch*, (1890) 42 Fed. Rep. 556.

Executive acts unauthorized by a state statute are within the inhibition of this clause. *Pacific Gas Imp. Co. v. Ellert*, (1894) 64 Fed. Rep. 421.

The action of a public board, though acting without authority conferred by statute, is

within the prohibition of this amendment. *Pacific Gas Imp. Co. v. Ellert*, (1894) 64 Fed. Rep. 421.

Action by a municipal council under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this amendment. *Iron Mountain R. Co. v. Memphis*, (C. C. A. 1899) 96 Fed. Rep. 113.

3. Not Against Wrongful Action of Individuals. — Civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the state by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration.

Civil Rights Cases, (1883) 109 U. S. 17. See also *Le Grand v. U. S.*, (1882) 12 Fed. Rep. 579; *U. S. v. Morris*, (1903) 125 Fed. Rep. 323; *Charge to Grand Jury*, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260; *Chilton v. St. Louis, etc., R. Co.*, (1893) 114 Mo. 92.

This clause adds nothing to the rights of one citizen against another; it simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. *U. S. v. Cruikshank*, (1875) 92 U. S. 554, *affirming* (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

The first section gives a citizen of the United States or of a state, and even persons who are not citizens, an additional guaranty of the enjoyment of their fundamental

rights. This guaranty is not against individual action or encroachment, but against the state, and its laws and its officers. These rights of the citizen are still to be protected and enforced, as between man and man, by and through state laws and agencies, and not by the United States and its laws. *Claybrook v. Owensboro*, (1883) 16 Fed. Rep. 301.

It is impossible for private persons to prevent, in the constitutional sense, the enjoyment of the right to the equal protection of the laws, since the right is actually enjoyed when a citizen or person is not improperly discriminated against in the making or execution of state laws. The Fourteenth Amendment in this respect confers only the right to a legal status, which status can be created, in the first instance, only by legislation, and, when conferred, can be impaired

only by acts of officials who wield state power in the execution of its laws. *Ex p. Riggins*, (1904) 134 Fed. Rep. 404.

Wrongful acts of state officers.— This prohibition is one against state action, and is not violated by the abuse of power on the part of subordinate officers. *Green v. State*, (1882) 73 Ala. 26.

This amendment has reference exclusively to state action, and not to any action by individuals, and the protection of the amendment cannot be invoked to enjoin a sheriff from selling complainant's property for the collection of certain taxes, on the ground that the tax and proceeding are not authorized by the law of the state. *Kiernan v. Multnomah County*, (1899) 95 Fed. Rep. 849. But see *supra*, p. 394, *Action of Executive and Administrative Officers*.

Theatre rules.— Where a theatre, under its regulations, reserved certain parts for white persons, and allowed persons of African blood to occupy other parts, it was held that the constitutional provision was not violated. *Younger v. Judah*, (1892) 111 Mo. 303.

When the state takes a person or citizen into custody for trial on accusation of crime

against its laws, the Constitution of the United States compels the state to afford him the enjoyment of many rights, among them, in a state, the protection of the prisoner while in confinement awaiting trial, the bringing of the prisoner into court, the assembling of a jury, the hearing of the witnesses and prisoner's counsel, the charge of the judge, the seclusion of the jury from outside interference, the return by the jury of a verdict in the presence of the prisoner, the passing of judgment upon him according to the verdict, and freeing or condemning him accordingly, and, if found guilty, allowing him an appeal, and suspending execution of sentence until the appeal can be heard in the appellate court. Individuals who forcibly take the prisoner from the custody of the state authorities and murder him, to prevent his being disposed of by due process, make it impossible for the state to afford him the enjoyment of the proceedings which make up the state's established course of judicial procedure, and in the strictest constitutional sense prevent and destroy the citizen's enjoyment of the right, privilege, or immunity to have the state afford him due process of law. *Ex p. Riggins*, (1904) 134 Fed. Rep. 404.

4. Territories and District of Columbia — Territories.— The Fourteenth Amendment was intended to be, as its language plainly expresses, a limitation upon the states in their sovereign capacity. This section can therefore be of little aid in determining the powers of the territorial legislature.

Territory v. O'Connor, (1889) 5 Dak. 400.

District of Columbia.— It is conceded that the constitutional provision does not purport to extend to authority exercised by the United States, but it does not follow that Congress, in exercising its power of legislation within and for the District of Columbia, may, therefore, deny to persons residing therein the equal protection of the laws. All of the guaranties of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several states.

Lappin v. District of Columbia, (1903) 22 App. Cas. (D. C.) 68, *citing* *Moses v. U. S.*, (1900) 16 App. Cas. (D. C.) 428; *U. S. v. Ross*, (1895) 5 App. Cas. (D. C.) 241; *Curry*

v. District of Columbia, (1899) 14 App. Cas. (D. C.) 423; *Stoutenburgh v. Frazier*, (1900) 16 App. Cas. (D. C.) 229.

II. WHO ARE CITIZENS — 1. In General.— In the Constitution and laws of the United States the word "citizen" is generally, if not always, used in a political sense, to designate one who has the rights and privileges of a citizen of a state or of the United States. It is so used in section 1 of Article XIV. of the amendments of the Constitution, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," and that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Baldwin v. Franks, (1887) 120 U. S. 690.

2. Corporation Not a Citizen. — A corporation is not a citizen within the meaning of this provision, and hence has not “privileges and immunities” secured to “citizens” against state legislation.

Orient Ins. Co. v. Daggs, (1899) 172 U. S. 561, *affirming Daggs v. Orient Ins. Co.*, (1896) 136 Mo. 382.

No Exception in Favor of National Banks. — To the rule that a corporation is not a citizen within the meaning of this clause, there is no exception in favor of national banks.

Hawley v. Hurd, (1900) 72 Vt. 124.

III. PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES —

1. Not a Grant of New Privileges. — Nothing more than the rights of the citizens previously existing, and dependent wholly on state laws for their recognition, is placed by this clause under the protection of the federal government and secured by the Federal Constitution.

Bartemeyer v. Iowa, (1873) 18 Wall. (U. S.) 133. See also *State v. Brennan*, (1891) 2 S. Dak. 388.

This is not a grant to the citizen resident, or sojourner, as an individual, of any right which he did not theretofore have, but it is a limitation upon the power of the states, put in the Federal Constitution. It is not a declaration of what privileges or immunities citizens of the United States are entitled to, but is a declaration that no state of the Union shall abridge them. *In re Mahon*, (1888) 34 Fed. Rep. 529, *affirmed Mahon v. Justice*, (1887) 127 U. S. 700.

Without reference to the history of the amendment, the circumstances under which and the special purpose for which it was adopted, it is manifest that it does not create or confer any new or additional privileges or immunities. It operates on those already existing, and which may be conferred or recognized by the states — the privileges and immunities meant and embraced by the same terms as elsewhere, and previously used in the Constitution. *Mangan v. State*, (1884) 76 Ala. 63.

2. Those Secured by the Constitution. — The privileges and immunities of citizens of the United States protected by this amendment are privileges and immunities arising out of the nature and essential character of the federal government, and granted or secured by the Constitution.

Duncan v. Missouri, (1894) 152 U. S. 382.

This amendment did not radically change the whole theory of the relations of the state and federal government to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *In re Kemmler*, (1890) 136 U. S. 448.

Rights protected and necessary to federal supremacy. — “When a citizen claims pro-

tection of a right or privilege, as one secured to citizens of the United States by its Constitution or laws, these inquiries arise: Is the right or privilege claimed granted in terms by any provision of the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the Constitution does specify and confer upon citizens of the United States as to arise by necessary implication? Is its exercise necessary or appropriate in the performance of any of the duties which the Constitution and laws of the United States exact from its citizens? Is its protection by federal authority needful to the just supremacy of the general government over any matter committed to it, or directly conservative or promotive of any of the ends for which the Constitution ordained the government of the United States? If the character of the right or privilege claimed does not permit affirmative answer to any of these inquiries, it is clear the right is not derived from or dependent on the Constitution, and its protection is not committed to the general government.” *U. S. v. Moore*, (1904) 129 Fed. Rep. 632.

"In what are known as the Slaughter-House Cases, (1872) 16 Wall. (U. S.) 36, two points were established: First, that this clause prohibited the action of the state alone, and gave Congress no power to legislate against the wrongs and personal violence of the citizen; second, that the privileges and immunities which a state could not abridge were only that limited class which depended immediately upon the Constitution of the United States. They are few in number, and of little importance to the great mass of the colored race in their present condition. The

right to pass from state to state and to the national capital, to protection upon the high seas and in foreign countries, and a few others, were stated as illustrations. The great body of our civil and political rights, that of acquiring and enjoying property, real and personal, to exercise trades, attend schools and churches, to be protected against personal violence, and enjoy the freedom of opinion, were declared to rest entirely under state protection and were not included in this amendment." Charge to Grand Jury, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260.

3. Of Citizens of the United States.—It is only the privileges and immunities of citizens of the United States which are placed by this clause under the protection of the Federal Constitution.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 74. See also Live Stock Dealers, etc., Assoc. v. Crescent City Live Stock Landing, etc., Co., (1870) 1 Abb. (U. S.) 388, 15 Fed. Cas. No. 8,408; Cully v. Baltimore, etc., R. Co., (1876) 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466; U. S. v. Anthony, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

The rights, privileges, and immunities which this clause guarantees, and which section 1979, R. S., was designed to protect, were the rights, privileges, and immunities which belong to citizens of the United States as such, but not the rights, privileges, and immunities which belong to citizens of the state. There are privileges and immunities belonging to citizens of the United States in that relation and character, and it is these, and these alone, that a state is forbidden to abridge. Wadleigh v. Newhall, (1905) 136 Fed. Rep. 946.

As distinguished from rights belonging to state citizenship.—In respect to citizenship, and the rights and privileges incident thereto, we have in the political system of this country, since the adoption of the Fourteenth Amendment to the Constitution, if such did not previously exist, both a national and state citizenship, corresponding with our dual form of government, state and federal, which owes allegiance to and is subject to the jurisdic-

tion and entitled to the protection of each government within the sphere of their respective sovereignties. U. S. v. Patrick, (1893) 54 Fed. Rep. 343.

This amendment itself classifies the privileges of citizens into those which they have as "citizens of the United States," and those which they have as "citizens of the state wherein they reside." *Ex p. Kinney*, (1879) 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825.

The rights of citizens of the state as such are not under consideration in this amendment. They stand as they did before the adoption of this amendment, and are fully guaranteed by other provisions. U. S. v. Anthony, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

This clause does not refer to citizens of the states. It embraces only citizens of the United States. It leaves out the words "citizen of the state," which are so carefully used, and used in contradistinction to citizens of the United States, in the preceding sentence. It places the privileges and immunities of citizens of the United States under the protection of the Federal Constitution, and leaves the privileges and immunities of citizens of a state under the protection of the state constitution. *Cory v. Carter*, (1874) 48 Ind. 349.

4. Limitations of the First Eight Amendments.—Rights claimed under the first eight amendments, adopted as restrictions of the powers of the national government, are not protected by this clause.

Maxwell v. Dow, (1900) 176 U. S. 601, wherein the court said: "It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the states cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations con-

tained in those amendments. This was also the contention made upon the argument in *Spies v. Illinois*, (1887) 123 U. S. 131, 151, but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision."

Limitations of Fourth and Fifth Amendments.—It cannot be said that this amendment has the effect of extending the operation of the Fourth and Fifth Amendments to the states. "For, as was held in *Mincer v. Happersett*, (1874) 21 Wall. (U. S.) 171: 'The amendment (speaking of the Four-

teenth) did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had.' And the same doctrine was held in the *U. S. v. Cruikshank*, (1875) 92 U. S. 542." *State v. Atkinson*, (1893) 40 S. Car. 371.

Right to keep and bear arms.—It is only the privileges and immunities of citizens of the United States that this clause was intended to protect. A state may pass laws to regulate the privileges and immunities of its own citizens, providing that in so doing it does not abridge their privileges and immunities as citizens of the United States, and a state, unless restrained by its own constitution, has the power to regulate or prohibit associations and meetings of the people, except in a case of peaceable assembly, to perform the duties or exercise the privileges of citizens of the United States. *Presser v. Illinois*, (1886) 116 U. S. 266, holding that a statute declaring that certain able-bodied men should be subject to military duty, and providing that "it shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this state, and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this state, without the license of the governor thereof, which license may at any time be revoked," is valid.

To be confronted with witnesses.—It is not one of the privileges or immunities of a citizen of the United States to be confronted with the witnesses against him in a state court, and a legislature may provide that a defendant appearing by counsel may be tried for a misdemeanor in his absence. *People v. Welsh*, (1903) 88 N. Y. App. Div. 66. See also *People v. Fish*, (1891) 125 N. Y. 151.

A trial by jury in suits at common law pending in the state courts is not a privilege

or immunity of national citizenship which the states are forbidden by this amendment to abridge. *Walker v. Sauvinet*, (1875) 92 U. S. 92.

Cruel and unusual punishments.—A state statute providing for the solitary confinement of one who has been condemned to death is not invalid as imposing a cruel and unusual punishment. *McElvaine v. Brush*, (1891) 142 U. S. 158.

A state statute providing for the infliction of the death penalty by the application of electricity is not such a cruel and unusual punishment as to abridge the privileges and immunities of citizens. *In re Kemmler*, (1890) 136 U. S. 449.

In *O'Neil v. Vermont*, (1892) 144 U. S. 323, Justice Field, in a dissenting opinion, said that the Fourteenth Amendment has made the Eighth Amendment applicable to the states.

The right of freedom of speech, and the other rights enumerated in the first eight articles of the amendments to the Constitution of the United States, are the privileges and immunities of citizens of the United States; they are secured by the Constitution, and Congress has the power to protect them by appropriate legislation. *U. S. v. Hall*, (1871) 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282, wherein the court said that the privileges and immunities of citizens of the United States here referred to "are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign. Among these are those which in the Constitution are expressly secured to the people, either as against the action of the federal or state governments."

5. Right of Suffrage—**a. IN GENERAL.**—The Constitution does not define the privileges and immunities of citizens, and the right of suffrage is not one of them. This amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitutions and laws of the states, but it operates for this purpose, if at all, through the states and the state laws, and not directly upon the citizen.

Minor v. Happersett, (1874) 21 Wall. (U. S.) 171. See also *Gougar v. Timberlake*, (1896) 148 Ind. 47.

The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. A state statute making it necessary for a person coming into the state to make

a declaration of intent to become a citizen and resident of the state, before he should have the right to be registered as a voter, does not violate the federal rights of any person taking up his residence in that state. *Pope v. Williams*, (1904) 193 U. S. 632.

The right of voting, or the privilege of voting, is a right or privilege arising under the constitution of the state, and not under

the Constitution of the United States. The qualifications are different in different states. Citizenship, age, sex, residence, are variously required in the different states, or may be so. If the right belongs to any particular person, it is because such person is entitled to it by the laws of the state where he offers to exercise it, and not because of citizenship of the United States. *U. S. v. Anthony*, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

A Massachusetts statute providing that registrars must require a person "to read at least three lines, other than the title, from an official edition of the Constitution, in such manner as to show that he is neither prompted nor reciting from memory," and must also require him "to write his name in the register," was held to be valid. *Stone v. Smith*, (1893) 159 Mass. 414.

No Race Discrimination. — While the right of suffrage is not a necessary attribute of federal citizenship, it is such an attribute as is exempt from discrimination in the exercise of that right on account of race and previous condition; and while the right to vote in the states comes from the states, the right of exemption from the prohibited discrimination comes from the United States.

Mills v. Green, (1895) 67 Fed. Rep. 829. See the Fifteenth Amendment, *infra*, p. 636.

b. WOMAN SUFFRAGE. — In denying to women the right to vote, a state does not violate the letter or spirit of this amendment.

U. S. v. Anthony, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459. See also *Minor v. Happersett*, (1873) 53 Mo. 62.

The right to vote is not one of the privileges or immunities of citizens protected by this amendment, and a woman cannot claim under its provisions the privilege of exercising the elective franchise. The language of the

second section of this amendment demonstrates that the elective franchise is not one of the privileges or immunities mentioned in this section, and to hold that the right to vote is one of the privileges or immunities protected would leave nothing for the Fifteenth Amendment to operate upon. *Van Valkenburg v. Brown*, (1872) 43 Cal. 52.

6. Right to Practice Law. — The right to admission to practice in the courts of a state is not one of the privileges or immunities belonging to citizens of the United States, and the refusal of a state court to grant a license to a woman to practice law is not within the prohibition of this clause.

Bradwell v. Illinois, (1872) 16 Wall. (U. S.) 139. See also *In re Lockwood*, (1894) 154 U. S. 116.

lege, or immunity secured to him by the Constitution and laws of the United States. *Philbrook v. Newman*, (1898) 85 Fed. Rep. 143.

A judgment of disbarment by a state court does not deprive a person of any right, privi-

7. Right to Organize Labor. — The right of citizens to organize miners, artisans, laborers, or persons in any pursuit, as well as the right of individuals in any such calling to unite for their own improvement or advancement, or for any other lawful purpose, is a fundamental right of a citizen, but is not granted in terms to any citizen of the United States by any provision of the Constitution. Its exercise is not necessary to the enjoyment of any right or privilege which the Constitution does not specify and confer. It does not result from relations of citizens of the United States to the government of the United States, as needful or proper to the discharge of any duty the citizen owes it. Its protection is not essential to the supremacy of the general government over any matter committed to it by the Constitution, nor is its enforcement a proper means to any end which the Constitution ordained the government of the United States to accomplish.

U. S. v. Moore, (1904) 129 Fed. Rep. 631.

8. Right of Asylum Against Unlawful Abduction of Fugitive. — The right of asylum in a state to which a fugitive from justice has fled is not a right of privilege or immunity which he can claim as against an unlawful abduction to a state in which an indictment is pending against him.

Mahon v. Justice, (1888) 127 U. S. 707, *affirming* (1888) 34 Fed. Rep. 530.

9. Resentence After Serving Part of Illegal Sentence. — One who has been sentenced by a court having jurisdiction of the offense and of the person and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, may be resented if it turns out on writ of error brought by him that the original sentence was unlawful, and in so doing the privileges and immunities of the defendant as a citizen of the United States have not been abridged.

Com. v. Murphy, (1899) 174 Mass. 370.

10. State Legislation Affecting Privileges and Immunities — *a. RECOGNITION OF RACIAL DISTINCTIONS* (see also *Exclusion of Negroes from Jury*, *infra*, p. 404) — (1) *Prohibiting Marriage of White and Colored Persons.* — The marriage relation is a civil institution and controlled by each state within its own territorial limits. A state statute which provides that "the marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void," does not abridge the privileges or immunities of a citizen.

In re Hobbs, (1871) 1 Woods (U. S.) 537, 12 Fed. Cas. No. 6,550, as to a *Georgia* statute. See also *State v. Gibson*, (1871) 36 Ind. 389; *State v. Jackson*, (1883) 80 Mo. 175. But see *Hart v. Hoss*, (1874) 26 La. Ann. 90.

The privilege of marriage is one which a person has as a member of society and as a citizen of the state, and not one which he has by virtue of the state in which he resides being a member of the American Union. *Ex p. Kinney*, (1879) 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825.

A *Tennessee* statute forbidding intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclu-

sive, and their living together as man and wife, is valid. *Lons v. State*, (1871) 3 Heisk. (Tenn.) 300.

A *Texas* statute providing that "if any white person shall, within this state, knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a white person, or, having so married in or out of the state, shall continue within this state to cohabit with such negro or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years," was not rendered void by the adoption of this amendment. *Frasher v. State*, (1877) 3 Tex. App. 264.

(2) *Separate Schools for White and Colored Children.* — A state statute which authorizes the maintenance of separate schools for white and colored children does not abridge the privileges and immunities of citizens of the United States.

People v. Gallagher, (1883) 93 N. Y. 438, *affirming* (Brooklyn City Ct. Gen. T. 1882) 11 Abb. N. Cas. (N. Y.) 187. See also *Cory v. Carter*, (1874) 48 Ind. 344; *People v. Easton*, (Supm. Ct. 1872) 13 Abb. Pr. N. S. (N. Y.) 159.

The privilege granted by the law of the state of attending public schools maintained at the expense of the state is not a privilege

or immunity appertaining to a citizen of the United States as such, and it necessarily follows, therefore, that no person can lawfully demand admission as a pupil in any such school because of the mere status of citizenship. *Ward v. Flood*, (1874) 48 Cal. 49.

The language of the clause, taken in connection with other provisions of the amendment, and of the Constitution of which it

forms a part, affords strong reasons for believing that it includes only such privileges or immunities as are derived from, or recognized by, the Constitution of the United States. A broader interpretation opens into a field of conjecture limitless as the range

of speculative theories, and might work such limitations of the power of the states to manage and regulate their local institutions and affairs as were never contemplated by the amendment. *State v. McCann*, (1871) 21 Ohio St. 209.

(3) *Validating Gifts Made for Education of White Persons.* — The continued operation of a state statute, making valid every gift, etc., made for the education of white persons within the state, enacted before the adoption of this constitutional amendment, does not abridge the privileges or immunities of citizens of the United States.

Kinnaird v. Miller, (1874) 25 Gratt. (Va.) 118.

(4) *Separate Coach Law.* — A statute requiring separate coaches or compartments for white and colored passengers does not violate this amendment.

Ohio Valley R. Co. v. Lander, (1898) 104 Ky. 431. See also *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160.

(5) *Bastardy Law Relating Only to White Women.* — A statute provides that any magistrate, upon receiving information that "any white woman" has given birth to an illegitimate child, "may issue his warrant" for her apprehension, and when she is brought before him, "require her to give security to indemnify the county from any charge that may accrue by means of such child, and upon neglect or refusal shall commit her to the custody of the sheriff of the county, to be by him kept until she shall give such security." But if she discloses on oath the father of the child, then it is made the duty of the magistrate "to discharge her," and to cause the father to be arrested and "to give security in the sum of eighty dollars to indemnify the county from all charges that may arise from the maintenance of the child." By another section, every constable who may have knowledge of "any white woman" having an illegitimate child, is required "to give information thereof to some justice of the peace of the county." Proceedings are thereupon had against the person charged with being the father. Such a statute does not conflict with this clause.

Plunkard v. State, (1887) 67 Md. 370.

(6) *Legislation Directed Against Chinese* — (a) *Prohibiting Employment by Corporations.* — A state constitution provides that "no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." In obedience to this mandate, the legislature passed an Act entitled "An Act to amend the Penal Code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations." The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive out those now within the state,

and prevent others from coming there; and this abridges their privileges and immunities.

In re Tiburcio Parrott, (1880) 1 Fed. Rep. 499.

(b) **Prohibiting Laundry Business.** — A city ordinance which makes it an offense to keep a laundry, wherein clothes are cleansed for hire, within the limits of the larger part of a city, without regard to the character of the structures or the appliances used for the purpose, or the manner in which the occupation is carried on, violates this clause.

In re Sam Kee, (1887) 31 Fed. Rep. 680. See also *In re Hong Wah*, (1897) 82 Fed. Rep. 623; *Stockton Laundry Case*, (1886) 26 Fed. Rep. 611.

Requiring health certificate. — A municipal ordinance declaring that "no person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order shall wash or iron clothes between the hours of ten o'clock P. M. and six o'clock A. M., nor upon any portion of that day known as Sunday," and declaring it to be unlawful for any person to establish, maintain, or carry on

the business of a public laundry or wash-house, where articles are cleansed for hire, within certain named limits, without having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire wardens, that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property, does not abridge the privileges or immunities of citizens of the United States. *Ex p. Moynier*, (1884) 65 Cal. 34.

b. **REGULATION OF JURIES** — (1) *Power of State to Prescribe Qualifications.* — No person, charged with a crime involving life or liberty, is entitled, by virtue of the Constitution of the United States, to have his race represented upon the grand jury that may indict him, or upon the petit jury that may try him. And so far as the Constitution of the United States is concerned, service upon grand and petit juries in the courts of the several states may be restricted to citizens of the United States. It rests with each state to prescribe such qualifications as it deems proper for jurymen, taking care only that no discrimination, in respect to such service, be made against any class of citizens solely because of their race.

In re Shibuya Jugi, (1891) 140 U. S. 297.

(2) *Statute Relating to Opinion of Juror.* — A state statute, as construed by the state court to mean that "although a person called as a jurymen may have formed an opinion based upon rumor or upon newspaper statements, but has expressed no opinion as to the truth of the newspaper statement, he is still qualified as a juror if he states that he can fairly and impartially render a verdict thereon in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement," does not abridge the privileges or immunities of citizens.

Spies v. Illinois, (1887) 123 U. S. 168.

(3) *Authorizing Trial by Eight Jurors.* — This provision does not limit the power of the state as to the establishment of courts or other tribunals, or as to the modes of procedure in them, and a provision in a state constitution declaring that in capital cases the right of trial by jury shall remain inviolate,

and that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors, is valid.

State v. Bates, (1896) 14 Utah 298. See also *State v. Carrington*, (1897) 15 Utah 480.

(4) *Exclusion of Negroes from Jury*. — The exclusion from the general venire of all people of the African race, on account of their color or race, would be an abridgment of the rights of such citizens, within the meaning of this amendment.

State v. Joseph, (1893) 45 La. Ann. 905.

(5) *Right of Mongolians to Serve as Jurors*. — A statute providing that "every qualified elector of the state * * * is a qualified juror of the county in which he resides," does not deprive a Mongolian of any right secured by the Constitution, laws, or treaty. The privilege, or duty, of being a juror is not always an incident of citizenship. There are citizens of the United States that are in the respective states denied the right to sit as jurors in the trial of civil or criminal cases.

State v. Ah Chew, (1881) 16 Nev. 58.

(6) *Right to Have Women on Jury*. — A jury composed exclusively of male persons when the constitution of the state requires that women, equally with men, shall be subject and eligible to jury duty where they possess the same qualifications as men, does not deprive a male defendant of a right or privilege of having members of the opposite sex as well as those of his own sex to determine his rights.

McKinney v. State, (1892) 3 Wyo. 724.

c. PROHIBITING SETTING ASIDE VERDICTS. — A statute which forbids the setting aside of a verdict as being against the weight of evidence, when three verdicts upon the facts in favor of the same party have been rendered, does not amount to an arbitrary deprivation of the rights of the citizen.

Louisville, etc., R. Co. v. Woodson, (1890) 134 U. S. 623.

d. STATUTORY PRESUMPTION AGAINST RAILROAD. — A statute which, in an action against a railroad for injuries, puts the presumption against the company is not unconstitutional as imposing upon it a presumption which is not enforced against private citizens. Such a presumption obtained at common law and had been the law of England and of this country prior to the statute, and it puts no greater hardship upon a particular railroad than upon anybody else engaged in the same business.

Augusta, etc., R. Co. v. Randall, (1887) 79 Ga. 314.

e. ATTACHMENTS AGAINST NONRESIDENTS. — A statute providing for the issuance of an attachment against a nonresident is not in conflict with this clause.

Pyrolusite Manganese Co. v. Ward, (1884) 73 Ga. 491.

f. APPOINTMENT OF GUARDIANS OF MINORS HAVING LIVING PARENTS. — A statute providing for the appointment of guardians by the Superior Court

for the persons of minors residing in the state who have no guardians legally appointed by will or deed is not invalid as depriving parents and children, in cases where the parents have been deprived of the custody of their children, of the rights, privileges, and immunities of the citizens of the United States.

Wadleigh v. Newhall, (1905) 136 Fed. Rep. 948.

g. GAME AND FISH LAWS — (1) *Shipping Game Out of the State.* — A prosecution under a Michigan statute for having in possession wild ducks, with intent to ship them beyond the limits of the state, does not infringe the privileges and immunities granted to citizens by this amendment.

People v. Van Pelt, (1902) 130 Mich. 621. See also American Express Co. v. People, (1890) 133 Ill. 652.

(2) *Regulating Leases of Oyster Lands.* — A New Jersey statute which denies the privilege of taking a lease of the state lands under water to persons who are not citizens and residents of the state, except those who, at the time of the passage of the Act, were holding and using the state's lands under those waters, and had oysters planted thereon under a usage, custom, or existing law of the state, and which denies the privilege to citizens and residents who had not been such for twelve months preceding the making of the lease, except those in the situation just mentioned, does not violate this clause.

State v. Corson, (1901) 67 N. J. L. 185.

h. SUNDAY LAWS — (1) *Requiring Closing of Places of Business.* — A state statute known as the Sunday Law, requiring the closing of all places of business, with the exception of certain designated classes, from twelve o'clock on Saturday night until twelve o'clock on Sunday night of each week, and punishing violations thereof by criminal penalties, is valid.

State v. Judge, (1887) 39 La. Ann. 136. See also State v. Fernandez, (1887) 39 La. Ann. 538.

(2) *Prohibiting Playing Baseball on Sunday.* — A state statute prohibiting the playing of baseball on Sunday where a fee is charged, and subjecting the players to a fine, is not invalid under this clause.

State v. Hogreiver, (1899) 152 Ind. 658, in which case the court said: "The state deals with it in the exercise of its police power, to circumscribe certain evils which are likely to result from its unrestrained practice, to

repress certain known pernicious tendencies, and to protect the citizens of the state in the enjoyment of that repose and quiet on the day set apart by secular laws for rest and recuperation to which they are entitled."

i. REGULATING MANUFACTURE AND SALE OF LIQUORS. — A state statute which, as construed by the Supreme Court of that state, provides that intoxicating liquors may be manufactured and sold within the state for chemical, medicinal, culinary, and sacramental purposes, but for no other — not even for the purpose of transportation beyond the limits of the state — is within the police power of the state and in the regulation of commerce. A state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said state; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and

such legislation by a state is a clear exercise of her undisputed police power, which does not abridge the privileges or immunities of citizens.

Kidd v. Pearson, (1888) 128 U. S. 16, affirming *Pearson v. International Distillery Co.*, (1887) 72 Iowa 348.

A state may absolutely prohibit the manufacture or sale of intoxicating liquors. *Kansas v. Bradley*, (1885) 26 Fed. Rep. 290.

The South Carolina Dispensary Act prohibiting the manufacture and sale of intoxicating liquors as a beverage within the state, except as therein provided, is valid. As the manufacture and sale can be entirely prohibited, they can be prohibited unless certain rules are complied with. *Cantini v. Tillman*, (1893) 54 Fed. Rep. 973.

Employment of women in bar rooms.—A municipal ordinance which forbids any female not having a license permitted by law, to

sell, offer, procure, furnish, or distribute any liquors or drinks, where intoxicating liquors are sold, does not deprive them of the privileges or immunities of citizens of the United States. *Hoboken v. Goodman*, (1902) 68 N. J. L. 218.

Regulating selling or giving liquor within one mile from Soldiers' Home.—A *Michigan* statute which provides that it shall not be lawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold, or kept for sale, within one mile of the Soldiers' Home, and also prohibits the sale or giving of liquor to a soldier, sailor, or marine who is an inmate or employee of such home, within the same distance, is a reasonable regulation. *Whitney v. Grand Rapids Tp.*, (1888) 71 Mich. 234.

Legislation by a State Prohibiting the Manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any privilege or immunity secured by the Constitution of the United States. Such legislation rests upon the acknowledged right of the states to control their purely internal affairs, and in so doing to protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government or violate rights secured by the Constitution of the United States.

Mugler v. Kansas, (1887) 123 U. S. 657.

The Right to Sell Intoxicating Liquors, so far as such a right exists, is not one of the rights growing out of citizenship in the United States.

Bartemeyer v. Iowa, (1873) 18 Wall. (U. S.) 138. See also *Cronin v. Adams*, (1904) 192 U. S. 114; *Cronin v. Denver*, (1904) 192 U. S. 115; *Foster v. Kansas*, (1884) 112 U. S. 205; *State v. Lindgrove*, (1895) 1 Kan. App. 51; *Trageser v. Gray*, (1890) 73 Md. 250; *State v. Brennan*, (1891) 2 S. Dak. 388; *Ripsey v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 15; *Danville v. Hatcher*, (1903) 101 Va. 527.

There is no inherent right in a citizen to sell intoxicating liquors by retail. The business may be entirely prohibited or be permitted under prescribed conditions, and the manner and extent of regulation rest in the discretion of the governing authority and are a matter of legislative will only. That officers do not exercise the power conferred upon them with wisdom or justice to the parties affected is a matter which does not affect the authority of the state, nor is it one which can be brought under the cognizance of the courts of the United States. *Crowley v. Christensen*, (1890) 137 U. S. 91, reversing *In re Christensen*, (1890) 43 Fed. Rep. 243.

The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the Constitution of the

United States, and the right to sell intoxicating liquors is not one of the rights accruing out of such citizenship. *Giozza v. Tiernan*, (1893) 148 U. S. 661.

The right to deal in alcoholic stimulants is not an immunity or privilege secured to any citizen by this amendment. Such right has always been subject to control and license. *Busch v. Webb*, (1903) 122 Fed. Rep. 664. See also *In re Hoover*, (1887) 30 Fed. Rep. 55.

Prohibiting sale by druggists.—A municipal ordinance, providing: "Be it further ordained by the authority aforesaid that it shall be unlawful to sell liquors at wholesale or retail in connection with drugs or in drug stores: provided that the compounding of liquors with drugs as parts of prescriptions, *bona fide*, made by reputable physicians in the treatment of disease, shall not constitute a violation of this ordinance," does not abridge the privileges and immunities of a wholesale and retail dealer in drugs. *Jacobs Pharmacy Co. v. Atlanta*, (1898) 89 Fed. Rep. 245.

Prohibiting sale of liquors in certain localities.—A state statute which absolutely forbids the sale of spirituous liquors outside the limits of incorporated cities, towns, and

villages, while in a subsequent section it provides for the granting of license to sell such liquors within the limits of incorporated cities, towns, and villages, does not abridge the privileges and immunities of citizens of the United States. *State v. Berlin*, (1884) 21 S. Car. 294.

Prohibiting sale of liquors to Indians.—A *Minnesota* statute which provides that "whoever sells * * * any spirituous liquors or wines to any Indian within this state shall on conviction thereof be punished," etc., was held to be valid, as applied to one who was by blood an American Indian, formerly belonging to the Sisseton and Wahpeton band of Sioux Indians, but who had severed all his relations with his tribe, adopted the habits and customs of civilization, and taken up an allotment of land in severalty, under the provisions of the United States "Land in Severalty Act," of Feb. 8, 1887, and thereby become a citizen of the United States, as well as of the state in which he resided. *State v. Wise*, (1897) 70 Minn. 99.

An Iowa statute enacts that "any citizen of the state, except hotel keepers, keepers of

saloons, eating houses, grocery keepers, and confectioners, is hereby permitted, within the county of his residence, to buy and sell intoxicating liquors for mechanical, medicinal, culinary, and sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted." An examination of the several sections of the statute shows that the restrictions were adopted, not for the purpose of securing an undue advantage to the citizens of the state, but for the purpose of preventing violations of the prohibitory law of the state; and although, in effect, the citizens of other states, as well as the larger part of the citizens of Iowa, are debarred from selling in Iowa liquors to be resold for legal purposes, and in that sense commerce between the states may be affected, yet this is but an incidental result; and as the intent and purpose of the restrictions, i. e., preventing violations of the prohibitory law, are within the police power of the state, it cannot be held that the sections of the statute under consideration violate any of the provisions of the Federal Constitution. *Kohn v. Melcher*, (1887) 29 Fed. Rep. 434.

Local Option Law Discriminating in Favor of Prohibition Vote.—A state local option law which, in the matter of ordering subsequent elections after prohibition has been defeated or carried, discriminates in favor of those who vote for prohibition, does not abridge the privileges or immunities of citizens.

Rippey v. Texas, (1904) 193 U. S. 509.

Druggists Required to Take Out License.—A state statute providing that spirituous liquors could not be subsequently used in the preparation of pharmacists' compounds without the pharmacist first procuring a druggist's license from the county commissioners, does not abridge the privileges and immunities, as a citizen of the United States, of a licensed pharmacist.

Gray v. Connecticut, (1895) 159 U. S. 77, wherein the court said: "A license to pursue any business or occupation, from the governing authority of any municipality or state, can only be invoked for the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected

by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same."

j. EMPLOYMENT OF WOMEN IN PLACES OF AMUSEMENT.—A statute providing that "no female person shall be employed in any capacity in any saloon, beer hall, bar-room, theatre, or place of amusement, where intoxicating liquors are sold as a beverage, and any person or corporation convicted of so employing, or participating in so employing, any such female person shall be fined not less than five hundred dollars; and any person so convicted may be imprisoned in the county jail for a period of not less than six months," is not repugnant to the Constitution as depriving persons lawfully engaged in the liquor business of the privilege or right of employing women who are competent to contract with reference to their own services.

In re Considine, (1897) 83 Fed. Rep. 157.

k. REGULATION OF PROSTITUTION. — A state statute providing that “any male person who lives with, or who lives off of, in whole or in part, or accepts any of the earnings of a prostitute, or connives in or solicits or attempts to solicit any male person or persons to have sexual intercourse, or cohabit with a prostitute, or who shall invite, direct, or solicit any person to go to a house of ill-fame, for any immoral purpose; or any person who shall entice, decoy, place, take, or receive any female child or person under the age of eighteen years, into any house of ill-fame or disorderly house, or any house, for the purpose of prostitution; or any person who, having in his or her custody or control such child, shall dispose of it to be so received, or to be received in or for any obscene, indecent, or immoral purpose, exhibition, or practice, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than five years, and fined in any sum not less than one thousand dollars nor more than five thousand dollars,” is valid. The privileges and immunities referred to are such as are lawful in character.

State v. Graham, (1904) 34 Wash. 82.

l. PROHIBITING VISITING PLACE WHERE OPIUM IS SOLD. — A municipal ordinance which provides that “every person who, in the city of Modesto, opens, keeps, or maintains any room or other place where opium, or any of its preparations, is sold or given away, and every person who resorts to, frequents, or visits such room or place, is guilty of a misdemeanor: provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist, for any ailment not caused by the use of opium, or any of its preparations,” under which a person may be convicted who visits a room described in the ordinance for some proper purpose, deprives such a person of rights and privileges secured by the Constitution and laws of the United States.

In re Ah Jow, (1886) 29 Fed. Rep. 181.

m. PROHIBITING BUSINESS OF TICKET SCALPING. — A statute entitled “An Act to prevent frauds upon travelers, and owner or owners of any railroad, steamboat, or other conveyance for the transportation of passengers,” does not abridge the privileges or immunities of citizens of the United States.

Burdick v. People, (1894) 149 Ill. 602, in which case the court said: “The right of conducting the business of selling railroad and steamboat tickets is curtailed and hedged about by certain restrictions, which the legis-

lature deemed necessary to prevent frauds upon travelers and public carriers. But these restrictions amount only to such restraints as the government may justly prescribe for the general good of the whole.”

n. REGULATING CITY AND PRIVATE MARKETS. — A municipal ordinance prohibiting the keeping of a private market within six squares of any public market of the city, does not abridge the privileges or immunities of a citizen of the United States.

Natal v. Louisinan, (1891) 139 U. S. 622.

Prohibiting sale of meat outside city markets. — An ordinance providing for the

establishment and regulation of markets at several points in a city, and prohibiting the sale of fresh meats at retail outside of these markets, except by tenants of the market

stall who are permitted to hawk about the streets after eight o'clock A. M. of the day, is not violative of any provision of the National Constitution. Both the necessity for police regulation, in a given instance, and

the adaptation of a particular regulation to the specific end in view, are matters entirely of state cognizance and final determination. *Ex p. Byrd*, (1887) 84 Ala. 18.

o. REGULATING SALE OF SEED COTTON. — A statute declaring that it shall be unlawful for any person to sell, deliver, or receive for a price, etc., any cotton in the seed, where the quantity is less than is usually baled, unless the contract is reduced to writing and signed by the parties in the presence of two witnesses and entered upon the civil docket of the nearest justice of the peace within ten days thereafter, is not in conflict with this amendment as depriving the citizen of his privileges or immunities.

State v. Moore, (1889) 104 N. Car. 714.

Prohibiting sale of seed cotton. — An *Alabama* statute which makes it unlawful for any person to sell or offer for sale, barter, exchange, or buy "within the counties and

boundaries specified 'any cotton in the seed,' or elsewhere to buy, sell, etc., any cotton in the seed raised within said counties," is not obnoxious to this clause. *Mangan v. State*, (1884) 76 Ala. 60.

p. GIVING MONOPOLY TO SLAUGHTER-HOUSE BUSINESS. — A statute incorporating a slaughter-house company prohibited the landing or slaughter of animals intended for food within the city of New Orleans except by the corporation thereby created. It authorized the company to establish and erect within certain territorial limits therein defined, one or more stock yards, stock landings, and slaughter houses, and imposed upon it the duty of erecting a slaughter house of a certain capacity. It declared that the company should have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privileges granted by the Act, and that all such animals should be landed at the stock landings and slaughtered at the slaughter houses of the company, and nowhere else. It was held that the restraint upon the exercise of their trade by the butchers of New Orleans did not abridge the privileges or immunities of citizens within the meaning of this amendment.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 36. See *Live Stock Dealers, etc., Assoc. v. Crescent City Live Stock Landing, etc., Co.*, (1870) 1 Abb. (U. S.) 388, 15 Fed. Cas. No. 8,408.

q. IMPOSING CONDITIONS ON SALE OF PATENT RIGHTS. — A statute which provides that "it shall be unlawful for any person to sell or barter, or to offer to sell or barter, any patent right, or any right which such person shall allege to be a patent right, in any county within this state, without first filing with the clerk of the court of such county copies of the letters patent, duly authenticated, and at the same time swearing or affirming to an affidavit, before such clerk, that such letters are genuine, and have not been revoked or annulled, and that he has full authority to sell or barter the right so patented; which affidavit shall also set forth his name, age, occupation, and residence, and, if an agent, the name, occupation, and residence of his principal; a copy of this affidavit shall be filed in the office of said clerk, and said clerk shall give a copy of said affidavit to the applicant, who shall exhibit the same to any person, on demand," is not invalid as imposing peculiar and unreasonable restrictions upon the patentee beyond those imposed upon owners of other kinds of property, and

thus abridging the privileges and immunities of such a person as a citizen of the United States. The provision is a legitimate exercise of the police power of the state for the prevention of fraud, and is not inconsistent with the constitutional provision of the laws relating to patents.

Reeves v. Corning, (1892) 51 Fed. Rep. 783. See also 8 FED. STAT. ANNOT. 628.

r. DECLARING SALES ON MARGIN OR FOR FUTURE DELIVERY VOID. — A provision of a statute declaring that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it, by suit in any court of competent jurisdiction," does not violate this clause.

Parker v. Otis, (1900) 130 Cal. 326.

s. PROHIBITING USE OF NATIONAL FLAG FOR ADVERTISING PURPOSES. — A statute providing that "it shall be unlawful for any person, firm, organization, or corporation to use or display the national flag or emblem, or any drawing, lithograph, engraving, daguerreotype, photograph, or likeness of the national flag or emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation, or organization," was held to be invalid, as depriving a citizen of the United States of the right to exercise a privilege impliedly, if not expressly, guaranteed to him by the Federal Constitution. The national government, in the exercise of its governing power to establish a flag or emblem symbolic of national sovereignty, passed sections 1791, 1792, R. S., and thereby took jurisdiction of the subject of the national flag and legislated upon it. As Congress has passed no legislation restricting its use or confining its use to any particular purpose, it would seem that if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the Act prescribing and describing the national flag.

Ruhrstrat v. People, (1900) 185 Ill. 134. See *People v. Van De Car*, (1904) 178 N. Y. 425.

t. REGULATING PRACTICE OF MEDICINE. — A statute, being "An Act to establish a medical council and three state boards of medical examiners, to define the powers of said medical council and said state board of examiners, to provide for the examination and licensing of practitioners of medicine and surgery, and to further regulate the practice of medicine and surgery, and to make appropriation for the medical council," is a valid and constitutional exercise of the police power of the state upon a subject plainly within that power.

In re Campbell, (1901) 197 Pa. St. 582, citing *Dent v. West Virginia*, (1889) 129 U. S. 114. See also *Com. v. Finn*, (1899) 11 Pa. Super. Ct. 620, and also the following cases: *Harding v. People*, (1887) 10 Colo. 390; *State v. Webster*, (1898) 150 Ind. 616; *State v. Green*, (1887) 112 Ind. 468; *People v. Phippin*, (1888) 70 Mich. 6; *Craig v. Medical Examiners*, (1892) 12 Mont. 208; *France v. State*, (1897) 57 Ohio St. 20; *State v. Ottman*, (1897) 6 Ohio Dec. 265; *State*

v. Randolph, (1892) 23 Oregon 80; *People v. Hasbrouck*, (1895) 11 Utah 300; *Fox v. Territory*, (1884) 2 Wash. 297; *State v. Carey*, (1892) 4 Wash. 429; *State v. Currens*, (1901) 111 Wis. 433.

That a magnetic healer may be prevented from practicing his profession by the operation of a statute regulating the practice of medicine, does not render the statute void. *Parks v. State*, (1902) 159 Ind. 212.

u. **REGULATING BUSINESS OF INSURANCE.** — A state statute providing "that it shall be unlawful for any person, partnership, or association, to issue, sign, seal, or in any manner execute any policy of insurance, contract, or guaranty, against loss by fire or lightning, without authority expressly conferred by a charter of incorporation, given according to law; and every such policy, contract, or guaranty, hereafter made, executed, or issued, shall be void," strikes at no privilege of citizenship of the United States, as distinguished from the privileges of citizenship of the state, and is a valid exercise of the police power. It does not prohibit, but regulates the business, and excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike, to entitle them to enter the business.

Com. v. Vrooman, (1894) 164 Pa. St. 307.

v. **REGULATING HOURS OF LABOR.** — A state statute providing that the period of employment of workmen in all underground mines or workings, and in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, except in cases of emergency where life or property is in imminent danger, does not abridge the privileges or immunities of citizens. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

Holden v. Hardy, (1898) 169 U. S. 380, affirming *State v. Holden*, (1896) 14 Utah 71. See also *Ex p. Boyce*, (1904) 27 Nev. 299, wherein it was held that a Nevada statute providing that "the period of employment of workmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger," and that "the period of employment of workmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger," was held to be within the power and discretion of the legislature to enact for the protection of the health and prolongation of the lives of the workmen affected, and the resulting welfare of the state. See also *Ex p. Boyce*, (1904) 27 Nev. 299.

Eight-hour law for laborers on public works. — A New York statute revising the charter of the city of Buffalo, which provides that "in contracting for any work required to be done by the city a clause shall be inserted that the contractor submitting proposals shall bind himself in the performance of such work not to discriminate either as to workmen or wages against members of labor organizations, or to accept any more than eight hours as a day's work, to be performed within nine consecutive hours; nor shall any man or set of men be employed for more than eight hours in twenty-four consecutive hours except in case of necessity, in which case pay for such labor shall be at the rate of time and one-half for all time in excess of such eight hours," does not unconstitutionally abridge the privileges and immunities of citizens of the United States. *People v. Warren*, (1894) 77 Hun (N. Y.) 121.

w. **REGULATING WEIGHING AND MEASURING COAL AT MINES.** — A state statute relating to weighing and measuring coal at the place where mined, before the same is screened, providing that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine, before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same, that coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and that the price

paid for each bushel so ascertained shall be such as may be agreed on as aforesaid, was held not to be so plainly and obviously in violation of the Constitution as to justify a court in declaring it void.

State v. Peel Splint Coal Co., (1892) 36 W. Va. 802.

x. REGULATING PAYMENT OF WAGES IN SCRIP. — A statute declaring it unlawful for any corporation, company, firm, or person engaged in any trade or business, either directly or indirectly, to issue, sell, give, or deliver to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness payable or redeemable otherwise than in lawful money; and that if such scrip, token, draft, check, or other evidence of indebtedness be so issued, sold, given, or delivered to such laborer, it shall be construed, taken and held in all courts and places to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm, or person issuing, selling, giving, or delivering the same to the person named therein, or to the holder thereof, was held not to be so plainly and obviously in violation of the Constitution as to justify a court in declaring it void.

State v. Peel Splint Coal Co., (1892) 36 W. Va. 802.

y. CIVIL SERVICE LAW. — A state civil service law was held not to be invalid as abridging the privileges and immunities of citizens of the United States, as the mode of determining whether the prescribed qualifications exist applies to all citizens alike, and therefore the rights and privileges of none in that regard are abridged, and the right of an elected and qualified officer to select his own subordinates is not a vested or private personal right.

People v. Loeffler, (1898) 175 Ill. 606.

z. REGULATING PUBLIC SPEAKING ON PUBLIC GROUNDS. — A municipal ordinance providing that "no person shall, in or upon any of the public grounds, make any public address * * * except in accordance with a permit from the mayor," is not void under this amendment, as the power conferred upon the chief executive officer of the city may be fairly claimed to be a mere administrative function vested in the mayor.

Davis v. Massachusetts, (1897) 167 U. S. 44.

a1. COMPULSORY LABOR IN REPAIRING ROADS. — A statute providing that all able-bodied residents of the county above twenty and under fifty years of age are compelled to labor two days at least in every year in repairing the roads of said county, with the privilege, however, of furnishing a substitute, or paying to the road supervisors seventy-five cents for each day such person may be summoned to labor, the money thus paid to be expended in repairing the roads, is not repugnant to this clause.

Short v. State, (1895) 80 Md. 397.

b1. REGULATING USE OF BICYCLES ON STREETS. — A municipal ordinance providing "that it shall be unlawful for any person to ride any bicycle upon the

streets after dark and before daylight without carrying or having a sufficient light to be easily seen the distance of at least one block," is not inhibited by this clause. The privilege of using a public street is always to be regulated so as to protect the equal rights of others.

Des Moines v. Keller, (1902) 116 Iowa 649.

c1. PRESCRIBING USE OF PARTICULAR PETROLEUM LAMP. — A statute providing that "if any person sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of not less than one hundred and five degrees standard Fahrenheit thermometer, closed test, except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp, he shall be punished," was held to be invalid, as it appeared that there were other lamps operated on the same general principle as the Welsbach, that were equally safe, and that they secured the same results.

State v. Santee, (1900) 111 Iowa 2.

d1. STATE TAXATION — (1) *Tax on Emigrant Agents.* — A state law taxing the business of hiring persons to labor outside the state limits does not restrict the right of a citizen to move from one state to another, and so abridge his privileges and immunities. "If it can be said to affect the freedom of egress from the state, or the freedom of contract, it is only incidentally and remotely. The individual laborer is left free to come and go at pleasure, and to make such contracts as he chooses, while those whose business it is to induce persons to enter into labor contracts and to change their location, though left free to contract, are subjected to taxation in respect of their business as other citizens are."

Williams v. Fears, (1900) 179 U. S. 274, affirming (1900) 110 Ga. 584. See also *Shepherd v. Sumter County*, (1877) 59 Ga. 535.

An Alabama statute providing that "no person, whether for himself or for other persons, shall be permitted to employ, engage, contract, or in any other way induce laborers to leave" a county designated in an Act "for the purpose of removing said laborers from this state, without first paying to each of said counties in which such person shall so operate a license tax of two hundred and fifty dollars, such license tax to be collected as other license taxes," and declaring a violation of its provisions a misdemeanor, is void as an indirect tax upon the citizen's right of free egress from the state, operating to hinder the exercise of his personal liberty, and seriously impair his freedom of emigration. *Joseph v. Randolph*, (1882) 71 Ala. 500, the court saying: "This act has none of the characteristics of a law designed to regulate these or kindred subjects, which properly fall within the purview of domestic police. There can be nothing so injurious or offensive in

the act of hiring a single unemployed laborer, for one's service, as to require police regulation by the state. Nor, very manifestly, is this statute designed to impose a mere occupation or business tax, which is always done either for purposes of revenue, or of police regulation."

A South Carolina statute entitled "An Act to prohibit emigrant agents from plying their vocation within this state without first obtaining a license therefor, and for other purposes," does not abridge the privileges of the citizen in restraining his right to make contracts of hiring, etc., or in restraining his right of egress from the state. The statute does not affect the right of any citizen to leave the state for labor elsewhere whenever he pleases, and to make such contract for labor as he chooses, but it affects only those who carry on the business of emigrant agents, whose vocation is to hire laborers and solicit emigrants, to be employed beyond the limits of the state. *State v. Napier*, (1901) 63 S. Car. 61.

(2) *Tax on Passengers.* — A state statute imposing a capitation tax upon passengers for the privilege of leaving the state, or passing through it by the

ordinary mode of passenger travel, deprives citizens of other states of the right to pass and repass through every part of the United States, as the tax would ultimately fall upon the passengers.

Crandall v. Nevada, (1867) 6 Wall. (U. S.) 49, reversing *Ex p. Crandall*, (1865) 1 Nev. 294.

(3) *Succession Tax*. — A state succession tax statute imposes a tax upon the transfer of any property, real or personal, when the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death. Taxing under this statute money which had been on deposit an indefinite time, after the whole succession has been taxed in the state in which the testator resided, is not a deprivation of any of the privileges or immunities of citizens.

Blackstone v. Miller, (1903) 188 U. S. 207.

A state statute imposing a transfer tax is not a deprivation of the privileges and immunities of citizens when there are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all es-

tates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation. *Orr v. Gilman*, (1902) 183 U. S. 287.

(4) *Taxing Debt Held Against Nonresident*. — The Constitution does not prohibit a state from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides. So long as the state, by its laws prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured by the Constitution of the United States, the Supreme Court, as between the state and its citizen, can afford him no relief against state taxation, however unjust, oppressive, or onerous.

Kirtland v. Hotchkiss, (1879) 100 U. S. 498.

(5) *Tax on Itinerant Venders*. — A state statute requiring itinerant venders to deposit five hundred dollars with the state treasurer, and take out a state license, and in addition to obtain a local license, which may be granted or refused in the discretion of the local governing board, does not conflict with this clause.

State v. Harrington, (1896) 68 Vt. 625.

(6) *License for Sale of Fertilizers*. — A statute providing that no commercial fertilizers shall be sold or offered for sale until the manufacturer or importer obtain a license from the treasurer of the state, for which shall be paid a privilege tax of five hundred dollars per annum for each separate brand, is not within the inhibitions of this clause. No privilege with regard to commercial fertilizers seems given by the Act to any citizen of the state which is denied to a nonresident, and, unless this be attempted, it can hardly be

said that he is deprived of any privilege or immunity to which he is entitled under the Constitution.

American Fertilizing Co. v. Board of Agriculture, (1890) 43 Fed. Rep. 609.

(7) *License to Deal in Trading Stamps*. — A municipal ordinance, passed under the authority of a state statute, defining gift enterprises, and imposing a license tax on every person, firm, or corporation, dealing in trading stamps, is valid. Wherever the thing sought to be regulated is of such a nature as that the legislature might prohibit it outright, because detrimental to the public interests, or against the public health or public morals, the manner of dealing with it is a matter solely addressed to the legislature, and is beyond judicial inquiry.

Humes v. Ft. Smith, (1899) 93 Fed. Rep. 863.

AMENDMENT 14, SECTION 1.

"Nor shall any state deprive any person of life, liberty, or property, without due process of law."¹

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¹ A similar clause, as an inhibition on the national government, is contained in the Fifth Amendment.

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I. PROHIBITION ON STATE ACTION.—That this amendment is a prohibition on all state agencies, whether legislative, judicial, or executive, and is not directed against the action of individuals, see under the clause of this section relating to the privileges and immunities of citizens, *supra*, p. 392.

II. WHEN CONSTITUTIONAL QUESTION INVOKED.—The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms or is made to read by construction, is fairly open to denial, and is denied.

Miller v. Cornwall R. Co., (1897) 168 U. S. 132.

III. CONSTRUCTION OF STATE STATUTES.—The essentials of due process of law should be distinguished from matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the law-making power of the state, and as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states.

Castillo v. McConnico, (1898) 168 U. S. 683.

"While it is settled law that this court will follow the construction put by the state courts upon wills devising property situated within the state, and while it is also true that we adopt the construction of its own statutes by the state courts, a question may remain whether the statute, as so construed, imports a violation of any of the rights secured by applicable provisions of the Constitution of the United States." *Orr v. Gilman*, (1902) 183 U. S. 283.

The Supreme Court of the United States will accept the construction by a state Su-

preme Court of a state statute for the condemnation of land, that the statute provides for notice of the proceedings to be given to the owner of the land. *Baltimore Traction Co. v. Baltimore Belt R. Co.*, (1894) 151 U. S. 138.

Upon reviewing, by writ of error, a judgment of the highest court of a state, the Supreme Court of the United States is not bound by that court's construction of a statute of such state when the question is whether the statute provides for the notice required to constitute due process of law. *Scott v. McNeal*, (1894) 154 U. S. 45.

IV. CORPORATIONS AS "PERSONS."—Corporations are persons within the meaning of this amendment, forbidding deprivation of property without due process of law, as well as a denial of the equal protection of the law.

Covington, etc., Turnpike Road Co. v. Sanford, (1896) 164 U. S. 592. See also the following cases: *Lake Shore, etc., R. Co. v. Smith*, (1899) 173 U. S. 690; *Gulf, etc., R. Co. v. Ellis*, (1897) 165 U. S. 154; *Home Ins. Co. v. New York*, (1890) 134 U. S. 606; *Minneapolis, etc., R. Co. v. Beckwith*, (1889) 129 U. S. 28; *Missouri Pac. R. Co. v. Mackay*, (1888) 127 U. S. 309; *Santa Clara County v. Southern Pac. R. Co.*, (1886) 118 U. S. 894, *affirming* (1883) 18 Fed. Rep. 385; *Singer Mfg. Co. v. Wright*, (1887) 33 Fed. Rep. 124; *Railroad Tax Cases*, (1882) 13 Fed. Rep. 741; *San Mateo County v. Southern Pac. R. Co.*, (1882) 13 Fed. Rep. 151; *Hammond Beef, etc., Co. v. Best*, (1898) 91 Me. 481; *Russell v. Croy*, (1901) 164 Mo. 69; *Hargraves Mills v. Harden*, (Supm. Ct. Tr. T. 1898) 26 Misc. (N. Y.) 665; *Knoxville, etc., R. Co. v. Harris*, (1897) 99 Tenn. 704; *Dugger v. Mechanics', etc., Ins. Co.*, (1895) 95 Tenn. 250. But see *Insurance Co. v. New Orleans*, (1870) 1 Woods (U. S.) 85, 13 Fed.

Cas. No. 7,052; Central Pac. R. Co. v. State Board of Equalization, (1882) 60 Cal. 35.

Private corporations are persons within the meaning of the amendment. *Charlotte, etc., R. Co. v. Gibbes*, (1892) 142 U. S. 391; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, (1888) 125 U. S. 189.

A railroad corporation is a person within the meaning of the Fourteenth Amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. *Smyth v. Ames*, (1898) 169 U. S. 518, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

Foreign corporations.—This clause applies to corporations, whether domestic or foreign, the same as individuals. "The only question is as to when is a corporation within the jurisdiction of the state. If such a cor-

poration comes into the courts of a state rightfully to have its rights adjudicated, I apprehend for that purpose it is within the jurisdiction of the state." *Black v. Caldwell*, (1897) 83 Fed. Rep. 885. See *infra*, *Service of Process—On Foreign Corporations*, p. 446.

The term "persons" includes corporations, but a corporation which is not created under authority of the state, and which is not carrying on business within the state under conditions subjecting it to process of the state courts, is not within the state's jurisdiction. *Hawley v. Hurd*, (1900) 72 Vt. 122.

Requiring foreign corporation to domesticate.—A state statute requiring a foreign corporation desiring to own property or carry on business or to exercise any corporate franchise in that state, to become a domestic corporation in the state is not repugnant to the due process of law clause of the Federal Constitution, although the effect of domestication, as required by the statute, is to take away the right of the corporation to remove causes from the state courts into the federal courts on the ground of diverse citizenship. *Debnam v. Southern Bell Telephone, etc., Co.*, (1900) 126 N. Car. 831.

Conditions as to maintenance and defense of actions by foreign corporations.—A statute which provides that any corporation created by the laws of any other state or foreign country which shall have failed to designate some resident person upon whom domestic process may be served, and file such designation at the office of the secretary of state, shall not maintain or defend any action or proceeding in any of the domestic courts,

is not in violation of the Fourteenth Amendment of the Constitution of the United States as denying due process of law to foreign corporations. *Keystone Driller Co. v. Superior Ct.*, (1903) 138 Cal. 738.

"Except in matters of interstate commerce, a state may undoubtedly prescribe the conditions on which a foreign corporation shall be permitted to do business within it, and may include therein a provision with regard to the service of process on its agents. *Lafayette Ins. Co. v. French*, (1855) 18 How. (U. S.) 404. Where, therefore, a foreign corporation does business in such state, it will be presumed to have assented to these terms. *St. Clair v. Cox*, (1882) 106 U. S. 350; *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, (1882) 13 Fed. Rep. 358; *U. S. v. American Bell Telephone Co.*, (1886) 29 Fed. Rep. 17; *Berry v. Knights Templars, etc., L. Indemnity Co.*, (1891) 46 Fed. Rep. 439. But it is essential in every case in which personal jurisdiction over such a corporation is claimed, that there shall have been an actual and substantial transacting of business by it within the state, and the process by which jurisdiction is sought to be obtained must have been served on one who is truly representative of the corporation. *St. Clair v. Cox*, (1882) 106 U. S. 350; *Fitzgerald, etc., Constr. Co. v. Fitzgerald*, (1890) 137 U. S. 98; *Mexican Cent. R. Co. v. Pinkney*, (1893) 149 U. S. 194; *Goldrey v. Morning News*, (1895) 156 U. S. 518; *Barrow Steamship Co. v. Kane*, (1898) 170 U. S. 100; *U. S. v. American Bell Telephone Co.*, (1886) 29 Fed. Rep. 17; *St. Louis Wire Mill Co. v. Consolidated Barb-Wire Co.*, (1887) 32 Fed. Rep. 802." *Frawley v. Pennsylvania Casualty Co.*, (1903) 124 Fed. Rep. 262.

V. "DEPRIVATION."—The Constitution contains no definition of the word "deprivation." To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it when employed in the same or any like connection.

Munn v. Illinois, (1876) 94 U. S. 123, *affirming* (1873) 69 Ill. 80.

VI. NATURE AND INCIDENTS OF DUE PROCESS OF LAW—1. In General.—Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisite is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

Caldwell v. Texas, (1891) 137 U. S. 697. See also *Duncan v. Missouri*, (1894) 152 U. S. 382; *Giozza v. Tiernan*, (1893) 148 U. S. 662; *Leeper v. Texas*, (1891) 139 U. S. 467. And see also throughout the notes under *State Action Affecting Life, Liberty, or Property*, *infra*, p. 429.

While this provision of the amendment is new in the Constitution of the United States,

as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in *Magna Charta*, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States, as a limitation upon the powers of the national government, and by the Four-

teenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states. *Munn v. Illinois*, (1876) 94 U. S. 123, *affirming* (1873) 69 Ill. 80.

The meaning of "law," as used in the Constitution, "is the common law that had come down to us from our forefathers, as it existed and was understood and administered when that instrument was framed and adopted. The framers of the Constitution, and the people who adopted it, appreciated the protection afforded to life, liberty, property, and privileges, by the common law, and determined to perpetuate that protection by making its benign provisions in this respect the cornerstone principle of the fundamental law." *State v. Doherty*, (1872) 60 Me. 504.

This clause is intended solely to prevent the arbitrary transfer of property from citizen to citizen without legal adjudication or process. *Charge to Grand Jury*, (1875) 30 Fed. Cas. No. 18,260.

Due process of law means a course of legal proceeding, according to those rules and principles which have been established in our systems of jurisprudence, for the protection and enforcement of private and personal rights. *Ex p. Stricker*, (1901) 109 Fed. Rep. 150.

The fact that a Remedy Is Speedy does not make a failure of due process of law when it can only be enforced by means of orderly proceedings in a court of competent jurisdiction, in accordance with rules and forms established for the protection of the rights of the parties.

Kennard v. Louisiana, (1875) 92 U. S. 483.

2. Synonymous with "Law of the Land." — In England the requirement of due process of law, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.

Missouri Pac. R. Co. v. Humes, (1885) 115 U. S. 519.

"'Due process of law' and 'law of the land' mean one and the same thing, and mean that one shall hold his life, liberty, and property under the protection of the general rules which govern society; and the assessment and collection of taxes, and the hearing of property owners with reference thereto are, from necessity, summary proceedings." *Cleveland, etc., R. Co. v. Backus*, (1892) 133 Ind. 513. See also *Knoxville, etc., R. Co. v. Harris*, (1897) 99 Tenn. 704.

Law of the land in each state. — Due process of law in this clause refers to that law of the land in each state which derives

Whether a mode of criminal procedure prescribed by a state statute is due process of law, depends upon the question whether it is in substantial accord with the law and usage in England before the declaration of independence, and in this country since it became a nation, in similar cases. *Lowe v. Kansas*, (1896) 163 U. S. 85.

Due process of law in a criminal case requires a law describing the offense. The offense must be described in an accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice. The admission of evidence for and against him must be according to established rules, and he must be convicted by the judgment of a competent court, and the punishment authorized by law. The definition of the offense, and the authority for every step in the trial, must be found in the law of the land. Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law. But the law defining the crime, the rules of evidence, or the procedure, may be changed by competent authority, constitutional authority, or common law. *State v. Bates*, (1896) 14 Utah 300.

its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. *Hurtado v. California*, (1884) 110 U. S. 535.

Due process of law is process due according to the law of the land. This process in the United States is regulated by the law of the state. The power of the federal court over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws

of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. *Walker v. Sauvinet*, (1875) 92 U. S. 92.

"It is a distinct provision from that which protects the right of trial by jury, and is usually declared as an alternative, as in *Magna Charta*—*nisi per legale iudicium parium suorum, vel per legem terræ*.' It would be difficult, perhaps impossible, to find in the reports a definition of the terms 'law of the land,' or 'due process of law,' which is accurate, complete, and appropriate under all circumstances. The peculiar necessities which call for the action of an officer, and whether a power was exercised in the same manner prior to the adoption of the Constitution, without being regarded a violation of the principles of *Magna Charta*, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit—the case being one in which the end sought to be attained is lawful—a statute cannot be said to deprive a party of the benefits of due process of law." *Ex p. Ah Fook*, (1874) 49 Cal. 406.

"Mr. Webster, in *Dartmouth College v. Woodward*, (1819) 4 Wheat. (U. S.) 518, defined 'the law of the land,' which is but another expression for 'due process of law,' thus: 'By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only

after trial. The meaning is that every citizen should hold his life, liberty, and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature.' Mr. Cooley thinks that this definition of Mr. Webster is quite accurate as applied to the judicial department of the government, but probably is not broad enough as applied to all the departments, and expresses the opinion that the definition of Judge Johnson in the case of *Columbia Bank v. Okely*, (1819) 4 Wheat. (U. S.) 235, as more comprehensive and more accurate. Justice Johnson says: 'As to the words of *Magna Charta* incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.' *Hoover v. McChesney*, (1897) 81 Fed. Rep. 480. See also *Meyers v. Shields*, (1894) 61 Fed. Rep. 718.

3. That Which Is Appropriate to the Particular Case.—By "due process of law" is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Hagar v. Reclamation Dist. No. 108, (1884) 111 U. S. 708, affirming *Reclamation Dist. No. 108 v. Hagar*, (1880) 4 Fed. Rep. 366.

"In judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'" *Davidson v. New Orleans*, (1877) 96 U. S. 107.

Due process of law means in each particular case such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. Property cannot be condemned and confiscated for violation of the inspection laws or police regulations of a state except upon a judicial hearing and trial, where the owner or person in charge of the property has notice and opportunity to be heard. *Armour Packing Co. v. Snyder*, (1897) 84 Fed. Rep. 139.

Adapted to the end to be attained.—By due process is meant one which, following

the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and it must give to the

party to be affected an opportunity of being heard respecting the justice of the judgment sought. *Railroad Tax Cases*, (1882) 13 Fed. Rep. 751.

4. Not Necessarily Judicial Process. — Due process is not necessarily judicial process. There is no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question.

Reetz v. Michigan, (1903) 188 U. S. 507. See also *Palmer v. McMahon*, (1890) 133 U. S. 668.

Due process of law is not necessarily judicial process; much of the process by means

of which the government is carried on, and the order of society maintained, is purely executive or administrative, which is as much due process of law as is judicial process. *Weimer v. Bunbury*, (1874) 30 Mich. 201.

5. Ascertained by Process of Judicial Inclusion and Exclusion. — The meaning of the term "due process of law" should be ascertained by the actual process of judicial inclusion or exclusion, as the cases presented for decision require, with the reasoning on which such decisions shall be founded. "As contributing to some extent to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us: That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Davidson v. New Orleans, (1877) 98 U. S. 104. See also *Kentucky R. Tax Cases*, (1885) 115 U. S. 330.

6. By Reference to Fifth Amendment. — The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation, affecting life, liberty, and property, as is offered by the Fifth Amendment against similar legislation by Congress; but the federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state applicable to all persons in like circumstances and conditions, and the federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

Hibben v. Smith, (1903) 191 U. S. 325. See also *Cory v. Carter*, (1874) 48 Ind. 327.

Whether or not the legal import of the phrase "due process of law" is the same in this as in the Fifth Amendment, it cannot be supposed that by this amendment it was intended to impose on the states, when exercising their powers of taxation, any more rigid or strict curb than that imposed on the

federal government in the similar exercise of power by the Fifth Amendment. *French v. Barber Asphalt Pav. Co.*, (1901) 181 U. S. 329.

Perpetuation of grand jury. — When the phrase "due process of law" was employed in this amendment to illustrate the action of a state, it was used in the same sense and with no greater extent than the same phrase

in the Fifth Amendment; and if, in the adoption of this amendment, it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have

embodied, as did the Fifth Amendment, express declarations to that effect. *Hurtado v. California*, (1884) 110 U. S. 535.

May Require Different Constructions and Applications. — While the language of the Fifth Amendment and this is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper.

French v. Barber Asphalt Pav. Co., (1901) 181 U. S. 328.

VII. MEANING OF LIBERTY — 1. In General. — The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Jacobson v. Massachusetts, (1905) 197 U. S. 26. See also *People v. Gillson*, (1888) 109 N. Y. 398; *People v. Marx*, (1885) 99 N. Y. 377, *reversing* (1885) 35 Hun (N. Y.) 528; *State v. Scougal*, (1892) 3 S. Dak. 72; *Yung v. Com.*, (1903) 101 Va. 862, and see also throughout the notes under *State Action Affecting Life, Liberty, or Property*, *infra*, p. 429.

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the

term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, (1897) 165 U. S. 589. See also *U. S. v. Sweeney*, (1899) 95 Fed. Rep. 434.

2. Right to Contract. — The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.

Lochner v. New York, (1905) 198 U. S. 53. See also throughout the notes under this clause of the Constitution.

The right to contract a debt or other personal obligation is included in the right to liberty, and the right to contract a debt, or to enter into a bond or other writing obligatory, is also a right of property. A *Michigan* statute which prohibits from going on a liquor dealer's bond one who is engaged, either as principal, agent, or servant, in the sale of any liquors mentioned in the Act, or is surety upon any other bond required by

the provisions of the Act, is a plain violation of this amendment. *Kuhn v. Detroit*, (1888) 70 Mich. 534.

Limited by the police power. — "Inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." *Knoxville Iron Co. v. Harbison*, (1901) 183 U. S. 22.

VIII. Right to Sue. — A right of action which springs from contract is property within the protection of this amendment.

Lamb v. Powder River Live Stock Co., (C. C. A. 1904) 132 Fed. Rep. 439.

A statute forbidding creditors to send any claim out of the state for the purpose of bringing suit thereon to subject the wages of a resident of the state to the payment thereof is unconstitutional in that it takes away without due process of law the right to bring suit, which is essential to the right of property. *In re Flukes*, (1900) 157 Mo. 125.

Unreasonable limitation of right to sue village for personal injuries. — A statute applicable to a certain village providing that "no action against said village for damages for personal injuries alleged to have been

sustained by reason of negligence of such village or of any departments, board, officer, agent, or employee thereof, shall be maintained unless the same shall be commenced within one year after the cause of action therefor shall have accrued, nor unless notice of intention to commence such action and of the precise time and place at which the injuries were received shall have been filed with the clerk of the village within forty-eight hours after such cause of action shall have accrued," etc., was held to be unconstitutional as depriving the injured person of property without due process of law. *Barry v. Port Jervis*, (1901) 64 N. Y. App. Div. 268.

IX. STATE ACTION AFFECTING LIFE, LIBERTY, OR PROPERTY — 1. Exercise of Police Power. — The inhibition upon the deprivation of property without due process of law is not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals.

New York, etc., *R. Co. v. Bristol*, (1894) 151 U. S. 567.

"The Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of a state to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state." *In re Converse*, (1891) 137 U. S. 631, *affirming* (1890) 42 Fed. Rep. 217.

If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribed for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law. *Missouri Pac. R. Co. v. Humes*, (1885) 115 U. S. 520.

As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that

no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberties, and property of its citizens, and to promote their health, peace, morals, education, and good order. *In re Kemmler*, (1890) 136 U. S. 448.

Must be reasonable. — Laws enacted in the exercise of the police power, however, whether by a municipal corporation acting in pursuance of the laws of a state, or by a state itself, must be reasonable, and are always subject to the provisions of both the federal and state constitutions, and they are always subject to judicial scrutiny. *In re Wilshire*, (1900) 103 Fed. Rep. 622.

Regulations of electric wires and cables. — New York statutes enacted, in effect, that all electric wires and cables in any city having a population of 500,000 or over should be placed under the surface of the streets, and the persons controlling the same should by a specified date have the same removed from the surface; and the local governments of such cities were authorized to remove such wires and cables wherever found above ground in case the owner failed to comply with the provisions of the Act. A subsequent statute created a board of commissioners of electrical subways for such cities. The commissioners entered into a contract with a subway company to lay subways in the city of New York for the use of all the electrical companies when furnished with plans and specifications therefor by the commissioners. This contract authorized the subway company to charge a rental for the use of the subways, and contained provisions reserving such a control in the commissioners over them as was calculated to secure to all companies desiring to use them reasonable facilities and protection. The contract was ratified by the legislature. The property rights of a telegraph company and companies owning electric wires were held not to be confiscated by depriving them of their easements for the benefit of the subway company, but the legis-

lation was an exercise of the police power. *Western Union Tel. Co. v. New York*, (1889) 38 Fed. Rep. 555.

A municipal ordinance which prohibits the suspension of electric wires over or upon the roofs of buildings is a valid ordinance, passed within the legitimate police powers of the city, when it is shown that the stretching of the wires over buildings in the manner practiced is extremely dangerous, both as being liable to originate fires, and as obstructing the extinguishment of fires otherwise originated. *Electric Imp. Co. v. San Francisco*, (1891) 45 Fed. Rep. 594.

Removal of poles and wires to another street.—A municipal corporation gave its consent to the original construction of a telephone system along a certain street. An ordinance requiring the removal of the telephone poles and wires from that street to a less frequented alley, for the reason that the telephone company has accumulated wires to such an extent as to endanger the life and safety of the citizens of the city, does not deprive the telephone company of property without due process of law. If there was any vested right in the privilege which was accorded by the city to construct and maintain telephone lines in the streets, it is a privilege which must continue in subordination to the strictly legislative action of the city which it exercises in respect to the matters delegated to it by the legislature for the public welfare. *Michigan Telephone Co. v. Charlotte*, (1899) 93 Fed. Rep. 12.

Regulation of use of highways.—Where the city council of a city is authorized by statute to regulate the use of streets and prevent obstructions being placed thereon, it may, by ordinance, prohibit the moving of buildings into and upon any of its highways without permission, and may designate an officer or committee to grant permission, upon application therefor, on proper occasions. Such an ordinance comes within the police power of the state, and does not deprive the citizen of his "property without due process of law," in violation of section 1, Art. XIV. of the amendments to the Constitution of the United States. *Eureka City v. Wilson*, (1897) 15 Utah 53.

Prescribing limits for residence of prostitutes.—A municipal ordinance declaring it to be unlawful for any public prostitute or woman notoriously abandoned to lewdness to dwell in any place without the prescribed limits, does not deprive one who may own or occupy property in or adjacent to the prescribed limits, whether occupied as a residence or for other purposes, of a constitutional right. *L'Hote v. New Orleans*, (1900) 177 U. S. 596, wherein the court said: "It has been often said that the police power was

not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation."

Granting exclusive right to remove dead animals.—A municipal ordinance granting an exclusive right and privilege to a certain person or his assigns of removing from the city limits all carcasses of such dead animals, not slain for human food, as shall not be removed and so disposed of as not in any manner to become a nuisance, within twelve hours next after the death of the same, by the owner thereof, or the person in whose possession such animal may be at the time of its death, or by the immediate servant or employee of such owner or person, is not invalid as depriving an independent contractor of property without due process of law. It is the duty of every government, whether state or municipal, to pass laws or ordinances for preserving the public health, protecting the good order and peace of society, and for providing for the abatement of nuisances. Such laws, if they contain nothing more than the necessary restrictions and limitations for the accomplishment of such purposes, are not unconstitutional on the ground that they deprive persons of their property without due process of law. *National Fertilizer Co. v. Lambert*, (1891) 48 Fed. Rep. 458.

Prohibiting fat rendering, bone boiling, and fertilizer manufacturing.—A New York statute which provides that "it shall not be lawful for any person or persons to engage in or carry on the business of fat rendering, bone boiling, or the manufacture of fertilizers or any business as a public nuisance within the corporate limits of any incorporated city of this state, or within a distance of three miles from the corporate limits of any incorporated city; provided, however, that nothing herein contained shall prevent the rendering of fresh-killed cattle or swine," is a valid exercise of legislative power. It does not infringe upon the liberty guaranteed to all to adopt any lawful pursuit not injurious to the community, because the business prohibited is so injurious. *People v. Rosenberg*, (1893) 67 Hun (N. Y.) 54.

The suppression of privy vaults by a municipal corporation is not a deprivation of property without due process of law. *Sprigg v. Park*, (1899) 89 Md. 406.

2. Proceedings under Statute Antedating Amendment.—Proceedings taken subsequent to the enactment of this amendment, under a statute passed prior to its enactment, fall within its inhibition.

Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., (1891) 142 U. S. 269, *affirming* *Green Bay, etc., Canal Co. v. Kaukauna Water-Power Co.*, (1888) 70 Wis. 635.

3. Degree of Judicial Power. — If a case can exist in which the kind or degree of power given by a state to its tribunals may become an element of due process, it would have to be a more extreme example than a state liquor law which does not define the words "wholesale" and "retail," and fails to limit the amount of the fine or penalty to be imposed by the court.

Ohio v. Dollison, (1904) 194 U. S. 450.

4. State Court Must Have Jurisdiction. — Proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute "due process of law." Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.

Pennoyer v. Neff, (1877) 95 U. S. 733.
See also *Scott v. McNeal*, (1894) 154 U. S. 46.

It is essential to due process of law that there shall not only be notice of time and place for the hearing, but, what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved. *Central of Georgia R. Co. v. Macon*, (1901) 110 Fed. Rep. 871. See also *Charles v. Marion*, (1899) 98 Fed. Rep. 168.

There must not only be a tribunal competent to act, but, where an action of the court involves the personal liberty of the defendant, he must, except in cases of actual contempts committed in the presence of the court, be brought within the jurisdiction of the court. *Es p. Stricker*, (1901) 109 Fed. Rep. 150.

A commitment on a hearing before a judge of a Court of Common Pleas, of a person who had been arrested on a trial justice's peace warrant, is due process of law. The state judge acted upon a matter within his jurisdiction and passed upon the construction of the state law and practice. *In re Enslow*, (1891) 45 Fed. Rep. 351.

A judgment in personam obtained against a nonresident on a service made on an agent under a statute which provides that "in actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager, or agent of, or person in charge of such business in this state, in the county where the business is carried on, or in the county where the cause of action occurred," is invalid as a deprivation of property without due process of law. *Moredock v. Kirby*, (1902) 118 Fed. Rep. 182.

A commitment by a justice of the peace for a crime not committed in his county is void for want of jurisdiction, and the party held thereunder is deprived of his liberty without due process of law, contrary to the Fourteenth Amendment. *In re Kelly*, (1890) 46 Fed. Rep. 654.

An order of a municipal court in a matter outside or in excess of the jurisdiction of the court is a deprivation of liberty without due process of law. *In re Monroe*, (1891) 46 Fed. Rep. 52.

5. State Control over Court Procedure — **a. IN GENERAL.** — The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey, (1899) 175 U. S. 175.

A state has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants. *York v. Texas*, (1890) 137 U. S. 20.

If the Supreme Court or a state has acted in consonance with the constitutional laws of the state and its own procedure, it could only be in very exceptional circumstances that the Supreme Court of the United States

would feel justified in saying that there had been a failure of due legal process. The party must have been deprived of one of those fundamental rights the observance of which is indispensable to the liberty of the citizen. *Allen v. Georgia*, (1897) 166 U. S. 138.

"The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West v. Louisiana*, (1904) 194 U. S. 263.

b. TRIAL UNDER GENERAL PROVISIONS OF LAW. — Where a party has had the benefit of a full and fair trial in the several courts of his own state, whose jurisdiction was invoked by himself, and his rights were measured not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he cannot claim to have been deprived of property without due process of law.

Marchant v. Pennsylvania R. Co., (1894) 153 U. S. 386.

Where an alleged statute does not conflict with any provision of the Federal Constitution, and, if void at all, is only void because of the application of general principles of legislative construction, and where under such a statute a person is indicted by a grand jury and regularly tried, convicted, and sentenced, with full opportunity to make all his defenses, in a state court, which, of course, decides

upon the validity of the statute under which it proceeds, he has had "due process of law," and no case is thereby made to authorize a federal court to interfere and release the convict on the ground that he is in custody in violation of the Constitution of the United States. To interfere in such a case would be an assumption of appellate jurisdiction by the federal courts in criminal cases in the state courts in which no distinctive, if any, federal question is involved. *Ex p. Kinnebrew*, (1888) 35 Fed. Rep. 52.

c. EXTRATERRITORIAL ARREST BY BAIL. — The arrest of a principal by his bail in a state other than that where the bail was given is not a denial of due process of law. There is a fundamental difference between the right of arrest by bail and arrest under warrant where such right to arrest is based upon a court process, which, *per se*, can have no extra-jurisdictional power of efficacy. The latter right depends upon the process of the court which issued it, and necessarily such process confers no power outside that jurisdiction. The former arrest, viz., of principal by bail, is based upon the relationship which the parties have established between themselves, and consequently, as between the parties, is not confined to any locality or jurisdiction.

In re Von Der Ahe, (1898) 85 Fed. Rep. 959, citing *Taylor v. Taintor*, (1872) 16 Wall. (U. S.) 371.

d. COMMITMENT FOR STATE OFFENSE UPON TRIAL FOR VIOLATION OF CITY ORDINANCE. — A statute requiring a city recorder to commit to jail or require bail of a person who, upon the trial after arrest for a violation of a city ordinance, appears probably to be guilty of a violation of the penal law of the state, is not in violation of the Fourteenth Amendment of the Federal Constitution.

Parks v. Nelms, (1902) 115 Ga. 242.

e. PRESENCE OF DEFENDANT — (1) *In General.* — Due process of law implies the right of the person affected thereby to be present before the tribunal

which pronounces judgment upon the question of his life, liberty, or property, and to have the right of controverting every material fact which bears on the question of right in the matter involved.

Ex p. Murray, (1888) 35 Fed. Rep. 497.

(2) *In Appellate Court*. — Due process of law does not require the personal presence of one convicted of a crime in an appellate court at the time of entering the order affirming the judgment by which he was sentenced; and this is so notwithstanding that the appellate court, under express authority conferred by statute, fixes the time when the punishment prescribed by the judgment which is affirmed shall be inflicted.

Schwab v. Berggren, (1892) 143 U. S. 451, wherein the court said that neither reason nor public policy requires that one convicted of a crime shall be personally present pending proceedings in the appellate court whose only function is to determine whether, in the transcript submitted to them, there appears any error of law to the prejudice of the ac-

cused, especially where he has counsel to represent him in the court of review. "We do not mean to say that the appellate court may not, under some circumstances, require his personal presence; but only that his presence is not essential to its jurisdiction to proceed with the case." See also *Fielden v. Illinois*, (1892) 143 U. S. 456.

f. SUFFICIENCY OF AFFIDAVIT FOR IMPRISONMENT OF JUDGMENT DEBTOR.

— A statute, in so far as it authorizes the arrest and imprisonment of a judgment debtor upon the affidavit of the plaintiff, his agent, or attorney, alone, denies the debtor due process of law.

Matter of Roberts, (1896) 4 Kan. App. 292.

g. DETENTION OF OFFENDER UNDER SEARCH WARRANT. — Where a person is arrested while violating a city ordinance against gambling, under a search warrant not naming him and issued upon an affidavit making no direct charge against him, and after being brought before the court is detained on such warrant alone, pending an adjournment of the case for trial, he is denied that "due process of law" secured by the Fourteenth Amendment of the Constitution of the United States. The proper proceeding would be to lodge a complaint in due form against him and issue process thereon for his detention.

State v. Newman, (1897) 96 Wis. 258.

h. NUMBER OF GRAND JURORS. — The provision of the Federal Constitution that no person shall be deprived of life or liberty without "due process of law" does not prohibit a state from authorizing a grand jury consisting of less than the common-law number of jurors.

Parker v. People, (1889) 13 Colo. 155.

The provision of the Virginia code that a grand jury shall consist of not less than six nor more than nine persons does not deny

the "due process of law" guaranteed by the Fourteenth Amendment of the Federal Constitution. *Hausenfluck v. Com.*, (1889) 85 Va. 702.

i. TRIAL BY JURY — (1) *In General*. — It is not a denial of a right protected by the Constitution of the United States for a state court to refuse a jury trial even though it is clearly erroneous to construe the laws of the state as justifying the refusal.

Iowa Cent. R. Co. v. Iowa, (1896) 160 U. S. 392. See also *State v. Kennard*, (1873) 25 La. Ann. 240; *State v. Moore*, (1899) 2 Penn. (Del.) 299.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. *Maxwell v. Dow*, (1900) 176 U. S. 603, wherein the court said: "It appears to us

that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of a grand jury, are eminently proper to be determined by the citizens of each state for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them."

That a state cannot deprive a person of his property without due process of law does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. *Walker v. Sauvinet*, (1875) 92 U. S. 92.

A jury trial is not in all cases essential to due process of law. Equity proceeds to a final determination of the most important rights without a jury, and so a statute may be established and new proceedings be carried on without the aid of a jury. *Montana Co. v. St. Louis Min., etc., Co.*, (1894) 152 U. S. 171.

Jury trial by five jurors.—A statutory provision that trial by jury in a city criminal court shall be by juries of only five is

not a denial of due process of law. *Welborne v. Donaldson*, (1902) 115 Ga. 563.

Trial by "court" not a denial of trial by jury.—In a suit under a statute authorizing any person claiming title to or interest in real estate to bring an action to quiet title, and providing that "the court shall hear the several claims and determine the rights of the parties," it was held that the word "court" meant the tribunal itself, and not merely the judge as distinguished from the jury, and that proceedings under the Act constituted "due process of law" and did not deprive the parties of their constitutional right to a jury trial. *Miles v. Strong*, (1896) 68 Conn. 273.

Failure to demand jury trial a waiver.—It is competent for the legislature to provide that in the trial of violations of city ordinances the failure of the accused to demand trial by jury shall be a waiver of that right. Such a statute is not repugnant to the Fourteenth Amendment as depriving a person of liberty without due process of law. *In re Cox*, (1902) 129 Mich. 635.

Legislation in derogation of common-law procedure.—Legislation which seeks to deprive an owner of his property without trial by jury and by proceedings not according to the course of the common law is invalid. *Reed v. Wright*, (1849) 2 Greene (Iowa) 15.

(2) *For a Felony.*—A verdict by a jury is not the essential part in a prosecution for a felony, and a state statute providing that if one indicted for murder shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime and give sentence accordingly, does not deprive him of life or liberty without due process of law.

Hallinger v. Davis, (1892) 146 U. S. 317.

(3) *Proceedings for Contempt.*—In matters of contempt, a jury is not required by due process of law.

Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 489, *reversing In re Interstate Commerce Commission*, (1892) 53 Fed. Rep. 476.

(4) *To Establish Equitable Interest in Land.*—This amendment does not prevent a state from giving jurisdiction to a court of equity of a suit brought by the owner of an equitable interest in land to establish his rights against the holder of the legal title, as depriving the holder of the legal title of the right to a trial by jury which he would have in a suit at law.

Church v. Kelsey, (1887) 121 U. S. 283.

(5) *Issue of Insanity.*—When, after a regular conviction and sentence, a suggestion of a then existing insanity is made, it is not necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and the requirements of a common-law jury trial, when, by the state law, full and

adequate administrative and *quasi-judicial* process is created for the purpose of investigating the suggestion.

Nobles v. Georgia, (1897) 168 U. S. 405.

Inquests of lunacy by a jury of six, as provided for by a *Mississippi* statute, do not

deprive any person of liberty without due process of law. *Fant v. Buchanan*, (Miss. 1895) 17 So. Rep. 371.

(6) *Trial by Struck Jury*. — Trial by a struck jury, when authorized by a statute valid under the constitution of the state, is due process.

Brown v. New Jersey, (1899) 175 U. S. 176.

(7) *Alien Juror*. — The fact that one of the jurors who tried the petition was an alien is not a denial of due process of law.

Kohl v. Lehlback, (1895) 160 U. S. 302.

j. SUFFICIENCY OF INDICTMENT — (1) *In General*. — No question of repugnancy to the Federal Constitution can be said fairly to arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental constitutional principles.

Caldwell v. Texas, (1891) 137 U. S. 698.

Whether an indictment sufficiently charges the crime of murder in the first degree is for

the state court to determine. *Bergemann v. Backer*, (1895) 157 U. S. 656. See also *In re Robertson*, (1895) 156 U. S. 183.

(2) *Validating Court Proceedings on Invalid Indictments*. — A statute purporting to confirm and make valid court proceedings on indictments found by a grand jury not legally drawn, impaneled, and sworn, is in contravention of section 1 of the Fourteenth Amendment of the Constitution as depriving persons of liberty without due process.

State v. Doherty, (1872) 60 Me. 504.

k. PROSECUTION OF FELONIES BY INFORMATION. — An indictment or presentment by a grand jury, as known to the common law of England, is not essential to due process of law when applied to prosecutions for felonies. The substitution of a presentment or indictment by a grand jury of the proceeding by information without examination and commitment by a magistrate, certifying to the palpable guilt of the defendant, with the right on his part to the aid of counsel and to the cross-examination of witnesses produced for the prosecution, is due process of law.

Hurtado v. California, (1884) 110 U. S. 520. See also *Maxwell v. Dow*, (1900) 176 U. S. 602; *Hodgson v. Vermont*, (1897) 168 U. S. 272; *Talton v. Mayes*, (1896) 163 U. S. 382; *McNulty v. California*, (1893) 149 U. S. 648; *Williams v. Hert*, (1901) 110 Fed. Rep. 168; *State v. Boswell*, (1885) 104 Ind. 541; *State v. Tucker*, (1890) 36 Oregon 291.

The Fourteenth Amendment to the Constitution of the United States was not adopted until after several states of the Union had made provision for prosecuting public offenses by information, and practically dispensing with the grand jury system, and after the validity of such constitutional

and statutory provisions had been affirmed by decisions of the courts of the respective states in which they were adopted. If an indictment or presentment of a grand jury is essential to "due process of law," within the meaning of that phrase as used in the Fourteenth Amendment, then all of the states, including those above referred to, which had theretofore enacted laws providing for prosecutions by information, are alike prohibited from proceeding in that manner against persons charged with violations of state law; and yet, in the twenty-five years since the adoption of this amendment, it has not been adjudged in a single case by any court that it has annulled or abrogated the laws pro-

viding for that mode of proceeding. *In re Humason*, (1891) 46 Fed. Rep. 389.

The design of this amendment was not to confine the states to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand jury system. And the words "due process of law," in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecutions for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in the Fourteenth Amendment to the Constitu-

tion of the United States which prevents them from doing so. *Rowan v. State*, (1872) 30 Wis. 149.

The manner in which a defendant may be arraigned and accused by state laws is a matter entirely of state regulation. The Constitution of the United States does not attempt in any way to say how the state shall regulate its procedure in enforcing its own laws. There is therefore no deprivation of liberty without due process of law by a proceeding that is in conformity with the state law, no matter how the state has seen fit to legislate as to procedure. *In re Krug*, (1897) 79 Fed. Rep. 311.

A Washington statute, authorizing the prosecution of offenses by information, is not invalid for the reason that it authorizes the prosecuting attorney to institute a prosecution for a criminal offense without any preliminary hearing or investigation or a finding of probable cause. *In re Humason*, (1891) 46 Fed. Rep. 390.

A State Constitution Which Declares that Felonies May Be Prosecuted by Information after the commitment by a magistrate is self-executing, and a prosecution for a capital felony under such a procedure does not deny due process of law.

Davis v. Burke, (1900) 179 U. S. 403. See also *Bolin v. Nebraska*, (1900) 176 U. S. 89, *affirming* (1897) 51 Neb. 581.

By leave of the court.—A state constitutional provision which authorizes prosecution by information without preliminary examination having been had, where the leave of the court is first obtained, is not a deprivation of the liberty of the citizen without due process of law. *State v. Brett*, (1895) 16 Mont. 366.

A provision in the California constitution providing that "offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment

with or without such examination and commitment, as may be prescribed by law," does not deprive any person of life or liberty without due process of law. "This proceeding, as is regulated by the constitution and laws of this state, is not opposed to any of the definitions given of the phrases 'due process of law' and 'law of the land'; but, on the contrary, it is a proceeding strictly within such definitions, as much so in every respect as in a proceeding by indictment. It may be questionable whether the proceeding by indictment secures to the accused any superior rights and privileges; but certainly a prosecution by information takes from him no immunity or protection to which he is entitled under the law." *Kalloch v. Superior Ct.*, (1880) 56 Cal. 229.

L. TWICE PUT IN JEOPARDY.—Whether the right not to be put twice in jeopardy of life or limb is forbidden in state courts by this amendment, *quære*.

Dreyer v. Illinois, (1902) 187 U. S. 71, wherein the court said: "If the due process of law required by the Fourteenth Amendment embraces the guaranty that no person shall be put twice in jeopardy of life or limb—upon which question we need not now express an opinion—what was said in *U. S. v. Perez*, (1824) 9 Wheat. (U. S.) 579, is applicable to this case upon the present writ of error and is adverse to the contention of the accused that he was put twice in jeopardy."

The principle of the common law that no person shall be subject for the same offense to be twice put in jeopardy, recognized by the Fifth Amendment as a restriction upon the federal government, is also within the scope of this clause as an inhibition on the states. *Ex p. Ulrich*, (1890) 42 Fed. Rep.

587, *reversed* (1890) 43 Fed. Rep. 661, on the ground that the District Court had not jurisdiction, by a writ of habeas corpus, to declare the judgment of a state court a nullity. See also dissenting opinion of Harlan, J., in *Hurtado v. California*, (1884) 110 U. S. 547.

A discharge of the jury against the objection of defendant after the trial has been entered upon, and after several adjournments pending the hearing and trial of another case, is a putting in jeopardy, and the defendant cannot be tried before another jury for the same offense. *Ex p. Ulrich*, (1890) 42 Fed. Rep. 587, *reversed* (1890) 43 Fed. Rep. 661, on the ground that the District Court had not jurisdiction, by a writ of habeas corpus, to declare the judgment of a state court a nullity.

m. COMMITMENT FOR FAILING TO TESTIFY BEFORE COUNTY ATTORNEY. — One who is held in custody and imprisoned by virtue of a commitment issued by the county attorney committing him to the county jail for refusing to obey a subpoena issued by the attorney, and refusing to be sworn and give testimony before him in proceedings under a state statute, being an Act amendatory to an Act prohibiting the manufacture and sale of intoxicating liquors, is deprived of liberty without due process of law.

In re Ziebold, (1885) 23 Fed. Rep. 791, wherein the court said: "The rules and forms known to the common law, in judicial proceedings not affecting the ultimate rights of the party, are not necessarily guaranteed to a person under the Constitution, and it has long been established that the remedial process of the law may be altered at the will of the legislature, so it does not impair a vested right, or cut off the remedy altogether.

The words 'due process of law,' then, must be directed at something deeper than the mere rules and forms by which courts administer the law. They evidently were intended to guarantee and protect some real and substantial right to life, liberty, and property as the ultimate result, and probably to prohibit any arbitrary and oppressive proceedings by which the individual is deprived of either."

n. IMPRISONING WITNESS WHO FAILS TO GIVE RECOGNIZANCE. — A statute authorizing an examining magistrate to commit to prison a witness who refuses to enter into a recognizance, with or without sureties, for his appearance, is not unconstitutional as denying due process of law.

Matter of Petrie, (1895) 1 Kan. App. 184.

o. ADMISSION OF DEPOSITION IN CRIMINAL CASE. — The admission of a deposition in a state court in the trial of a criminal action does not take away a right of such an important and fundamental character as to deprive a person of liberty without due process of law.

West v. Louisiana, (1904) 194 U. S. 262.

p. CROSS-EXAMINATION BY STATE OF ITS OWN WITNESS. — A statute authorizing the party introducing a witness to contradict him by other evidence and to show that he has made at other times statements inconsistent with his present testimony, and construed to give the state the right to cross-examine its own witness in a criminal prosecution, is not repugnant to the Fourteenth Amendment of the Constitution of the United States as denying due process of law to the accused.

State v. Bloor, (1898) 20 Mont. 574.

q. REFUSAL OF COURT TO REFER TO PRESUMPTION OF INNOCENCE. — Refusal to refer to the presumption of innocence in a charge to the jury, when the court charged that the guilt of the accused must be shown beyond a reasonable doubt, and also explained what is meant by the term "reasonable doubt," which charge was sustained by the state Supreme Court, is not a denial of due process of law.

Howard v. Fleming, (1903) 191 U. S. 137.

r. CONVICTION IN FIRST DEGREE AFTER REVERSED CONVICTION IN SECOND. — The provision in a state constitution and in the rules of the Supreme Court of that state, that a person who has been tried and convicted of murder in the second degree on an indictment for murder in the first degree, which

conviction is reversed on appeal and the cause remanded for a new trial, may for the second time be put on trial for murder in the first degree, violates no provision of the Fourteenth Amendment.

State v. Goddard, (1901) 162 Mo. 198.

s. JUDGMENT BY DE FACTO JUDGE. — When by a state law, at the time of the trial and sentence of an accused person, the court in which he was tried and sentenced was a court *de jure*, and the judge who tried and sentenced him was at least judge *de facto*, and the sentence itself was valid, such sentence is not a deprivation of liberty without due process of law.

In re Manning, (1891) 139 U. S. 506.

One who has been convicted of the offense charged against him in a court having jurisdiction of the subject-matter and the person,

held by at least a *de facto* judge, is not restrained of his liberty or adjudged to lose his life without due process of law. *In re Ah Lee*, (1880) 5 Fed. Rep. 907.

t. MODE OF CARRYING OUT DEATH SENTENCE — (1) *In General.* — The question whether a person shall be executed under an Act of the state legislature by the warden of the penitentiary or under the law as it stood at the time of his trial and conviction, by the sheriff, involves no question of due process of law.

Davis v. Burke, (1900) 179 U. S. 404.

(2) *At Time to Be Fixed by Governor.* — A statute providing that a death sentence shall be carried out at a time to be fixed by the governor of the state does not deprive one convicted of a capital felony of life without due process of law. The order designating the stay of execution is, strictly speaking, not part of the judgment unless made so by statute, and the power conferred upon the governor to fix the day of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court.

Holden v. Minnesota, (1890) 137 U. S. 495.

(3) *By Electricity.* — The infliction of the death penalty by the application of electricity, provided for by a state statute, is not such a cruel and unusual punishment as to deprive a citizen of life without due process of law.

In re Kemmler, (1890) 136 U. S. 449.

(4) *Setting Another Date After Day of Execution Passed.* — Upon conviction of a capital felony, when the time appointed for execution has passed, pending an appeal to the Supreme Court of the state, the subsequent appointment of another day by the state court and the issue of a death warrant in accordance with state statute involves no violation of the Constitution.

Craemer v. Washington, (1897) 168 U. S. 130.

u. STAYING EXECUTION OF SENTENCE. — The Federal Constitution neither grants nor forbids to the governor of a state the right to stay the execution of a sentence.

Storti v. Massachusetts, (1901) 183 U. S. 142.

v. METHOD OF RESENTENCE ON AFFIRMANCE OF JUDGMENT. — Due process of law does not require that the accused shall, upon the affirmance of a judgment, be sentenced anew by the trial court or be present when the day is fixed by the appellate court for carrying the original sentence into execution. The judgment prescribing the punishment is not vacated by the writ of error; only its execution is stayed pending proceedings in the appellate court.

Schwab v. Berggren, (1892) 143 U. S. 451.

w. RESENTENCE AFTER SERVING PART OF ILLEGAL SENTENCE. — One who has been sentenced by a court having jurisdiction of the offense and of the person and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, may be resentenced if it turns out on writ of error brought by him that the original sentence was unlawful, and in so doing the defendant has not been deprived of his liberty without due process of law.

Com. v. Murphy, (1899) 174 Mass. 370. See also *Murphy v. Massachusetts*, (1900) 177 U. S. 155.

x. IMPRISONMENT UNDER VOID ORDINANCE. — A person imprisoned upon a warrant issued under a void law is deprived of his liberty without due process of law, and if such a warrant is issued by a person deriving his authority from the state, such deprivation is, in contemplation of the Constitution, the act of the state.

In re Lee Tong, (1883) 18 Fed. Rep. 255.

y. RIGHT OF APPEAL. — The right of appeal is not essential to due process of law.

Reetz v. Michigan, (1903) 188 U. S. 508.

In making assessments for taxation. — It is not essential to due process of law in making assessments for taxation that a right of appeal to the courts should be provided. That a state board of equalization meets at

stated times regulated by law, and all parties in interest had the right to appear before the board and to be heard, is sufficient to meet the constitutional requirement that one shall not be deprived of his property without due process of law. *McLeod v. Receveur*, (C. C. A. 1896) 71 Fed. Rep. 458.

An Appeal from a Judgment of Conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such an appeal. The review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law.

McKane v. Durston, (1894) 153 U. S. 687.

A state statute which does not provide that an appeal from an order directing its execution shall of itself operate to stay its execution of the judgment, is not in violation of the Constitution of the United States. *In re Durrant*, (1898) 84 Fed. Rep. 319.

Constitutional amendment fixing jurisdiction of cases previously appealed. — An

amendment to the *Missouri* constitution dividing the Supreme Court into two divisions and giving division number two exclusive jurisdiction of criminal cases is not in conflict with the Constitution of the United States as denying due process of law because of its application to cases which had been appealed prior to its adoption. *State v. Jackson*, (1891) 105 Mo. 196.

z. REARRANGING JURISDICTION OF APPELLATE COURT. — An amendment to a state statute increased the number of the Supreme Court judges from five to seven, and provided that the court should be divided into two divisions, to be

known respectively as division number one and division number two, of which divisions the one known as number two, consisting of only three judges and not seven, was to have exclusive jurisdiction of all appeals in criminal cases. It was held that this amendment did not deprive one, charged with having committed an offense before its adoption, of life without due process of law.

State v. Jackson, (1891) 105 Mo. 198.

a1. AUTHORITY OF APPELLATE COURT TO MODIFY VERDICT. — A statute provides that "the Supreme Court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." The petitioner had been tried on an indictment charging the crime of murder in the first degree, a verdict had been brought in finding him guilty as charged in the indictment, and he was sentenced to death. Upon a review of the case the Supreme Court of the state considered the evidence insufficient to warrant a conviction of the crime of murder in the first degree, and on that ground reversed the judgment of the Superior Court; but instead of setting the verdict aside, or ordering the Superior Court to do so, the Supreme Court ordered that said verdict stand, and remanded the case to the Superior Court, with instructions to enter a new judgment against the petitioner, adjudging him to be guilty of murder in the second degree and to proceed thereon in accordance with law. In obedience to such instructions, the Superior Court adjudged the petitioner to be guilty of murder in the second degree, and sentenced him therefor to be punished by imprisonment at hard labor in the state penitentiary for a period of twenty years. It was held that the second judgment was void, and the imprisonment thereunder was without due process of law.

In re Friedrich, (1892) 51 Fed. Rep. 747, refusing the writ of habeas corpus on the ground that a writ of error was the proper remedy, and on this ground affirmed, (1893) 149 U. S. 70.

b1. DISMISSAL OF WRIT OF ERROR ON FAILURE OF ESCAPED CONVICT TO SURRENDER. — When a party had been convicted of a criminal offense, and, pending a hearing of a writ of error from the Supreme Court of a state, escaped from jail, he was not denied due process of law by an order of the Supreme Court that the writ of error be dismissed unless he should within sixty days surrender himself to custody, or should be captured within that time so as to be subject to the jurisdiction of the court.

Allen v. Georgia, (1897) 166 U. S. 138.

6. Notice and Opportunity to Be Heard — **a. IN GENERAL.** — This clause does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings, in which notice is given of the claim asserted, and an opportunity afforded to defend against it. If the essential elements of full notice and an opportunity to defend were present, the United States Supreme Court will accept the interpretation given by the state court as to the regularity under a state statute of the practice pursued in a particular case.

Simon v. Craft, (1901) 182 U. S. 436. See also *Hooker v. Los Angeles*, (1903) 188 U. S. 318; *Iowa Cent. R. Co. v. Iowa*, (1896) 160 U. S. 393; *Indianapolis v. Holt*, (1900) 155 Ind. 222; *Rouse v. Donovan*, (1895) 104 Mich. 234; *State v. Billings*, (1893) 55 Minn. 467; *Chicago, etc., R. Co. v. State*, (1896) 47 Neb. 549; *Stuart v. Palmer*, (1878) 74 N. Y. 133; *Phillips v. Postal Tel. Cable Co.*, (1902) 130 N. Car. 513.

See *infra*, *Taxation—Notice and Opportunity to Be Heard*, p. 523.

The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights have been denied, the courts are governed by the substance of things and not by mere form. *Simon v. Craft*, (1901) 182 U. S. 436.

Due process of law is a regular course of judicial proceedings, of which parties to be affected are entitled to notice, and in which they may be heard. An Act of the legislature is not such due process, and in the taking of property by such an Act the state would be depriving the person entitled to the property, of the property, contrary to the Fourteenth Amendment. *Ball v. Rutland R. Co.*, (1899) 93 Fed. Rep. 517.

Where a party has appeared and been heard in a proceeding there is no color for his contention that he has been deprived of his property without due process of law. *Lynde v. Lynde*, (1901) 181 U. S. 186.

Opportunity to make particular defense.—One who has voluntarily appeared in a case and actively conducted the defense cannot be held to have been denied by the courts of the state of the right to make a defense which was never presented. *Louisville, etc., R. Co. v. Schmidt*, (1900) 177 U. S. 238, wherein the court said: "This court cannot be called upon to conjecture that defenses existed which were not made, and to decide that proceedings in a state court have denied due process of law because defenses were

denied, when they were not presented. And especially must that be so where the court of last resort of the state, on review of all the proceedings, has held that full opportunity to make every defense was afforded." *Affirming Schmidt v. Louisville, etc., R. Co.*, (1896) 99 Ky. 143.

Imprisonment in city workhouse without hearing.—A city charter which makes the term of the imprisonment of a person, committed for intoxication to the city workhouse, depend, primarily, upon the decision of the superintendent of the city workhouse, made upon an "examination and inspection" of the person committed, as to whether she is identical with a former prisoner, and, finally, upon the decision of the same question by the city commissioner of correction, made from the records upon a written descriptive statement of the prisoner transmitted by the superintendent of the city workhouse, and which permits this determination to be made without notice to the prisoner or opportunity afforded her to be heard, violates the due process of law clause of the Federal Constitution. *Matter of Kenny*, (Supm. Ct. Spec. T. 1898) 23 Misc. (N. Y.) 9, *affirmed* (1898) 30 N. Y. App. Div. 624.

The Forcible Entry and Detainer Act of Washington, by which it is provided that a tenant of real property for a term less than life is guilty of unlawful detainer when he holds over or continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him; that in all cases where real property is leased for a specified term or period, by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period, does not deny "due process of law" within the prohibition of the Fourteenth Amendment of the Federal Constitution. *Morris v. Healy Lumber Co.*, (1903) 33 Wash. 451.

b. REASONABLE NOTICE.—A state statute providing for the service of process by giving five days' notice, exclusive of the day of service and of the return day, is not a reasonable notice in the case of a nonresident of the state. In this case it would have taken the party, traveling continuously, four days to reach the place where the court was held.

Roller v. Holly, (1900) 176 U. S. 407, *reversing* (1896) 13 Tex. Civ. App. 636.

A notice of ten days from the last of three successive daily publications, of a reassessment for taxation for public improvements, was held to be sufficient. *Bellingham Bay, etc., R. Co. v. New Whatcom*. (1899) 172 U. S. 318, wherein the court said: "It may be that the authority of the legislature to prescribe the length of notice is not abso-

lute and beyond review, but it is certain that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time."

Notice of four weeks by publication to enforce the collection of taxes on lands owned by nonresidents was held to be sufficient. *Johnson v. Hunter*, (1904) 127 Fed. Rep. 222.

c. NOTICE IN PROCEEDINGS IN REM.—Proceedings under a state statute, providing that the state officers shall seize and take into custody a vessel found

dredging for oysters, without a license, and if, upon trial and conviction, the offenders do not pay the fine imposed upon them within twenty days, then the justice shall direct the vessel to be sold after twenty days' notice, are not invalid as depriving of property without due process of law. "It is true that there was no notice, by service or publication of notice, to the owner or holders of maritime or other liens, that the vessel was being proceeded against; but a proceeding *in rem* forms an exception to the general rule of notice, particularly when based upon actual manucaption of the thing which is the instrument of the wrong, and in such cases the seizure has been held to be constructive notice to every one having any interest in the thing seized."

The Ann, (1881) 8 Fed. Rep. 926.

Seizure of vessel violating oyster law.—A *New Jersey* statute provides that after seizure of a vessel for the alleged violation of the state oyster law, information shall immediately be given to two justices of the peace of the county where such seizure shall have been made, who shall meet at such time and place as they shall appoint, and hear and determine the matter. This constitutes due process of law. *Haney v. Compton*, (1873) 36 N. J. L. 523, in which case the court said: "Provision is made for hearing the parties, and judgment is to be given only after such hearing. There is to be a regular

trial after due appointment of time and place for the same. Any arbitrary, unjust, illegal, or oppressive proceeding of the justices, if any such should happen, may be corrected by the Supreme Court by virtue of that general superintending power which it has over all inferior jurisdictions. It appears to me that it would be going too far to hold that such proceeding is void because no express provision is made for notice to the defendant of the seizure. The seizure of the vessel while in the hands of the owner or his employees is practically as effective notice that the proceeding has been initiated as could, under the circumstances, be given."

d. CREATING BOARD OF RAILROAD COMMISSIONERS.—An article of a state constitution creating a board of railroad commissioners is not invalid as not requiring notice to the railroads.

Southern Pac. Co. v. Railroad Com'rs, (1896) 78 Fed. Rep. 258, *quoting*, in support of the decision, from the concurring opinion of Miller, J., in *Chicago, etc., R. Co. v. Minnesota*, (1890) 134 U. S. 460: "I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions."

Proceedings before the railroad commissioners, after a notice was served upon the general freight agent of each of the railroads in the state, giving time and place of meeting, at which time and place the representatives of the railroads appeared and were heard,

but no proposed change in existing classification or rates was indicated by the commission, and no issue was submitted which could be either agreed to or made the subject of proof or suggestion by argument, and the commissioners from time to time altered and fixed the rates, do not constitute "due process of law." *Mercantile Trust Co. v. Texas, etc., R. Co.*, (1892) 51 Fed. Rep. 541.

Fixing railroad rates.—A state statute provides that where rates for switching are fixed by the railroad commission, if the company do not obey it within ten days, proceedings by mandamus can be instituted by the commissioners to compel the railroad company to comply with the provisions of the Act in regard to posting in their several depots the prices and rates fixed by the commission; and, if such proceeding is not instituted by the commissioners within ten days, the corporation feeling itself aggrieved thereby may take an appeal to the District Court of the state; and when the appeal is taken, and proceedings are brought in the district, it may be proceeded with as a civil action. This gives due process of law. *Chicago, etc., R. Co. v. Becker*, (1887) 32 Fed. Rep. 854.

Making Rates Fixed by Commission Conclusive.—A state statute which, as construed by the state Supreme Court, provides that the rates recommended and published by the state railroad commission are not simply advisory, nor merely *prima*

facie equal and reasonable, but final and conclusive as to what are equal and reasonable charges, and which neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact, deprives the railroad company of its right to a judicial investigation by due process of law on the truth of a matter in controversy.

Chicago, etc., R. Co. v. Minnesota, (1890) 134 U. S. 457.

To the objection that the Texas statute of 1891, establishing a railroad commission, declared the rates and regulations made by the commission conclusive in all actions between private individuals and the companies, the court said: "It is familiar law that one section or part of an Act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a

law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power." Reagan v. Farmers' L. & T. Co., (1894) 154 U. S. 390. See also Southern Pac. Co. v. Railroad Com'rs, (1896) 78 Fed. Rep. 258, as to the validity of the clause of the California constitution in the article relating to the appointment and duties of railroad commissioners, providing that "in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable."

e. NOTICE TO RAILROAD OF PROCEEDING TO ESTABLISH HIGHWAY CROSSING.

— The fact that an interstate railroad company had no actual notice of a highway proceeding, and did not appear thereto, and was awarded no damages, does not entitle it to be awarded damages in a mandamus proceeding to require it to construct a highway crossing; and the denial of such claim is not a taking of property without due process of law and without just compensation, in violation of the Fourteenth Amendment of the Federal Constitution.

Baltimore, etc., R. Co. v. State, (1902) 159 Ind. 510.

f. RIGHT OF PROPERTY OWNERS AS TO LAYING TRACKS IN STREETS. — A resolution adopted in secret conclave, in "committee of the whole," by a municipal council, granting to an electric company the privilege of laying a track on a residential street without giving the property owners and residents an opportunity to be heard, as had been requested, was held to be a deprivation of property rights without due process of law.

Holst v. Savannah Electric Co., (1904) 131 Fed. Rep. 931.

g. OF FIXING WATER RATES. — Formal notice is not necessary as to the precise day upon which water rates will be fixed by municipal ordinance. When a state constitution provides that ordinances or resolutions fixing rates would be passed annually in the month of February in each year, and would take effect on the first day of July thereafter, and it is made by statute the duty of the city at least thirty days prior to the 15th day of January in each year to obtain from the water company a detailed statement, showing the names of water-rate payers, the amount paid by each during the preceding year, and "all revenue derived from all sources," and the "expenditures made for supplying water during said time," and it was the right and duty of appellant in January of each year to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the rates that should

be allowed by ordinance, it cannot be said that the water company is denied an opportunity to be heard upon the question of rates.

San Diego Land, etc., Co. v. National City, (1899) 174 U. S. 752, *affirming* (1896) 74 Fed. Rep. 79. See also *San Diego Land, etc., Co. v. Jasper*, (1898) 89 Fed. Rep. 281.

h. PARTIES INTERESTED IN COMMUNITY PROPERTY. — A statute providing that "all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by and against their respective intestates," under which it was held by the state Supreme Court that the heirs of a deceased mortgagor were not necessary parties to an action against the administrator, does not deprive a surviving wife of her right in community property without due process of law. What is community property, how derived, how it shall descend, and what subject to, are matters of state policy and regulation. The California law invests a husband with the power to encumber the community property of himself and wife. If it could give this power, it was certainly competent to provide that the power should continue after his death, and provide how it could be made effectual to the holder.

Hearfield v. Bridge, (1895) 67 Fed. Rep. 333, *affirmed* (C. C. A. 1896) 75 Fed. Rep. 47.

i. BEFORE FINAL JUDGMENT. — Due process of law is afforded litigants if they have an opportunity to be heard at any time before final judgment is entered.

Wilson v. Standefer, (1902) 184 U. S. 415.

j. NOTICE BY STATUTE. — When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice.

Reetz v. Michigan, (1903) 188 U. S. 509.

k. TRIAL ACCORDING TO APPLICABLE MODE OF PROCEDURE. — It is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issue affecting it, he has by the laws of the state a fair trial in a court of justice according to the modes of proceeding applicable to such a case.

Davidson v. New Orleans, (1877) 96 U. S. 105. See also *Kentucky R. Tax Cases*, (1885) 115 U. S. 330; *Fallbrook Irrigation Dist. v. Bradley*, (1896) 164 U. S. 157.

l. SUMMARY JUDGMENT AGAINST PROSECUTOR FOR COSTS. — A state statute which provides that "whenever it shall appear to the court or jury trying the case, that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid," was held not to be a deprivation of liberty without due process of law in a particular case when the record contained nothing having any tendency to show that at the trial he was denied the opportunity of offering argument or

evidence in support of his good faith and probable cause, or requested of the court any ruling or instruction upon that subject.

Lowe v. Kansas, (1896) 163 U. S. 87.

m. **EX PARTE DECISION OF OVERSEERS.** — The *ex parte* determination of two overseers of the poor is not due process of law upon the question of the commitment of an alleged pauper to the workhouse.

Portland v. Bangor, (1876) 65 Me. 120.

n. **SUMMARY PROCEEDING FOR VIOLATION OF ELECTION LAW.** — A state statute which confers upon the judges of election the authority where a person is, in their judgment, violating the provisions of the election law, after he has been ordered to cease such action and he refuses to desist, to order his arrest and to commit him for a time not exceeding twenty-four hours, does not deprive such person of liberty without due process of law.

Cox v. Gilmer, (1898) 88 Fed. Rep. 343.

o. **SUMMARY PROCEEDING AGAINST ASSIGNEE FOR CREDITORS.** — A summary proceeding against an assignee for the benefit of creditors, by the order of a referee in bankruptcy, to show cause why the assignee should not pay over certain items in his statement of account, is not due process of law. If an assignee is a proper party to the preliminary proceedings, it can only be for the purpose of contesting one of the facts which would give his adversary grounds for hostile proceedings, namely, the bankruptcy of the party proceeded against, and the consequent investment of the bankrupt's title in the trustee. By making the assignment, a party to the original petition is not precluded from his right to object to having the question of his obligation to pay the money specified in the order to show cause determined in that summary way.

Sinsheimer v. Simonson, (C C. A. 1901) 107 Fed. Rep. 904.

p. **JUDGMENT AGAINST SURETY.** — A judgment rendered against a surety on a forthcoming bond in an attachment proceeding, without a hearing, does not deprive him of property without due process of law, as such a bond was given in view of the existing statute, and the surety virtually consented that judgment might go against him on the bond if the plaintiff should be entitled to judgment against his principal.

Johnson v. Chicago, etc., Elevator Co., (1886) 119 U. S. 400.

q. **SETTLEMENT WITHOUT NOTICE BY SPECIAL ADMINISTRATOR.** — A statute which authorizes a special administrator having charge of the estate of a testator, pending a contest as to the validity of his will, to have a final settlement of his accounts, without giving notice to the distributees, and which settlement, in the absence of fraud, is deemed conclusive as against such distributees, does not deprive such distributees of property without due process of law. When a special administrator ceases to act as such, that is, when his functions cease by operation of law, he must account for the property and estate in his hands to the executor or administrator with the will annexed, who,

in receiving what had been temporarily in charge of the former, acts for all interested in the distribution of the estate.

Robards v. Lamb, (1888) 127 U. S. 61.

r. SERVICE OF PROCESS — (1) *Effect of Challenging Validity of Service.* —

A statute which, as construed by the Supreme Court of the state, provides that a defendant who appears only to obtain the judgment of the court upon the sufficiency of the service of process upon him is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose, does not violate this clause.

Kauffman v. Wootters, (1891) 138 U. S. 286.

Legislation simply forbidding the defendant to come into court and challenge the validity of the service upon him in a personal action, without surrendering himself to the jurisdiction of the court, and which does

not attempt to restrain him from fully protecting his person, his property, and his rights against any attempt to enforce a judgment rendered without due service of process, does not deprive him of liberty or property within the prohibition of this amendment. *York v. Texas*, (1890) 137 U. S. 19.

(2) *On Domestic Corporations.* — A statute providing that until a domestic private corporation has filed with the register of deeds of the county where its principal office is located a list of its officers upon whom service of process, etc., may be made, such service may be made by leaving a copy of the process, etc., with the register of deeds, is void.

Pinney v. Providence Loan, etc., Co., (1900) 106 Wis. 396.

(3) *On Foreign Corporations — (a) In General.* — A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as the state may think proper to impose. The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any action arising out of its transactions in the state, it will accept as sufficient the service of process on any agent specially designated. Such conditions must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation.

St. Clair v. Cox, (1882) 106 U. S. 356.

Action should have relation to employee's business. — As a nonresident corporation must be doing business in the state to authorize service on the agent or employee, it would seem reasonable that such service of process would be in an action in some way connected with or touching the matter which the employee represents. *Strain v. Chicago Portrait Co.*, (1903) 126 Fed. Rep. 834.

Service upon the secretary of a foreign corporation in a state in which the corporation has its principal office and place of business, under a statute requiring foreign corporations to have resident agents authorized "to accept service of process in any action

or suit pertaining to the property, business, or transactions of such corporation within this state in which such corporation may be a party," was held to be sufficient, even as to a cause of action arising in another state and not pertaining to the property, business, or transactions in that state. *Smith v. Empire State-Idaho Min., etc., Co.*, (1904) 127 Fed. Rep. 462.

An Arkansas statute provides that "in all cases where cause of action shall accrue to a resident or citizen of the state of Arkansas, by reason of any contract with a foreign corporation, or where any liability on the part of a foreign corporation shall accrue in favor of any citizen or resident of this state, whether in tort or otherwise, and such foreign cor-

poration has not designated an agent in this state upon whom process may be served, or has not an officer continuously residing in this state upon whom summons and other process may be served so as to authorize a personal judgment, service of summons and other process may be had upon the auditor of state, and such service shall be sufficient to give jurisdiction of the person to any court in this state having jurisdiction of the subject-matter, whether sitting in the township or county where the auditor is served, or elsewhere in the state." The legislature evidently intends that a foreign corporation doing business in the state should not escape suit in the state for contracts entered into by it or torts committed by it, by simply ceasing to do business in the state, recalling its agents, and revoking the authority of the person designated by it under the law to receive process, and the statute has no application whatever to contracts entered into or torts committed by corporations not doing business within the state at the time the cause of action accrued, and to that extent the statute is valid. *Davis v. Kansas, etc., Coal Co.*, (1904) 129 Fed. Rep. 149.

Missouri statutes provide and contemplate that where a nonresident corporation is doing business in a state, but has no actual situs as by having an office or appointed agent under the provisions of the statute requiring nonresident corporations doing business in the state to establish an office or agency, etc., upon whom service can be had and to make report to its principal, service may be had upon the agent of the company wherever found in the state, but except from their operation "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely nonresident."

It was held that a service of process upon a soliciting agent whose duty it was simply to obtain and send in orders for goods which would be passed upon by the company, and if accepted the goods would be shipped to itself at the destination where the orders were taken, was not valid. *Strain v. Chicago Portrait Co.*, (1903) 126 Fed. Rep. 831. See also *Boardman v. S. S. McClure Co.*, (1903) 123 Fed. Rep. 614.

A Tennessee statute providing that "any corporation claiming existence under the law of any other state, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof liable to the same, so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here, but not otherwise;" that "any corporation having any transaction with persons or having any transaction concerning any property situated in this state, through any agency whatever acting for it within this state shall be held to be doing business within the meaning of" the statute, and that "process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be, and in the absence of such an agent it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time the transaction out of which the suit arising took place," does not violate the Fourteenth Amendment, as depriving foreign corporations of property without due process of law. *Connecticut Mut. L. Ins. Co. v. Spratley*, (1897) 99 Tenn. 322.

(b) *On Special Agent.* — An insurance company complied with a state statute requiring a nonresident corporation doing business in the state to establish an office and agent there upon whom process could be served, by locating a general agent who had charge of the company's business, but soon thereafter, and after a certain policy of insurance had been issued, the company withdrew its agent from that state. Upon a claim being sent in upon that policy to the company an agent was sent with authority not only to investigate the loss, but to adjust it in any such way as he saw fit. Upon a disagreement as to the adjustment, and pending negotiations while he was there, the administrator brought suit against the company in the state court, and service was had upon such special agent. It was held that the agent was, for the purpose of the case, *pro hac vice*, the corporation itself, and that he was there in his capacity as adjusting agent of a transaction connected with the very matter of his local supervision, and for that reason the service upon him was sufficient.

Connecticut Mut. L. Ins. Co. v. Spratley, (1899) 172 U. S. 602.

(4) *Personal Service on Nonresident.* — A judgment without personal service against a nonresident is good only so far as it affects the property which is taken or brought under the control of the court or other tribunal in an

ordinary action to enforce a personal liability, and no jurisdiction is thereby acquired over the person of a nonresident further than respects the property so taken.

Dewey v. Des Moines, (1899) 173 U. S. 203.

Personal judgment against unserved nonresident.—A statute providing that when the attached property of nonresidents "is not sufficient to satisfy the recovery, execution may issue for the residue, as in other cases," violates the clause of the Fourteenth Amendment forbidding the taking of property without due process of law, in authorizing personal judgments and execution against nonresidents without personal service of process upon them for an amount in excess of that produced by the attached property. *Kemper-Thomas Paper Co. v. Shyer*, (1902) 108 Tenn. 444.

The issuance of an attachment from a justice's court in Vermont against the property of a nonresident defendant who had no agent in the state, upon service by delivering the writ to the treasurer of a railroad company which was indebted to the defendant, is a proceeding in violation of the due process of law clause of the Federal Constitution. *Martin v. Central Vermont R. Co.*, (1888) 50 Hun (N. Y.) 347.

(5) *On Nonresident Partner.*—A state statute provides that where the defendant is a nonresident of the state, the clerk shall, upon the application of any party to the suit, address a notice to the defendant, requiring him to appear and answer the plaintiff's petition at the time and place of the holding of the court, naming such time and place. In a suit against a partnership in which the resident partner was duly served with process and a nonresident partner was served with notice, according to the above statute, the judgment was held binding upon the firm debts, and the nonresident partner was not deprived of property without due process of law, though there could be no execution against his individual property.

Sugg v. Thornton, (1889) 132 U. S. 525.

A Tennessee statute which provides that "when a corporation, company, or individual has an officer or agency or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein, in all actions brought in such county against said company, growing out of the business of or connected with said company or principal's business," if it ought to be construed so as to authorize a service of process for nonresident partners, upon their resident agent, without any attachment of or proceeding against their property, or if such construction had been given to it by the Supreme Court of the state, would lack due process of law. *Brooks v. Dun*, (1892) 51 Fed. Rep. 141, wherein the court said: "Since the case of *Pennoyer v. Neff*, (1877) 95 U. S. 714, the question there decided has been often before the Circuit Courts, and in

In proceedings for allowance for children of divorced parents.—Service of notice outside of the state, in proceedings for an increase of an allowance provided for by statute for the maintenance of children of divorced parents, does not violate the provision of the Fourteenth Amendment that no person shall be deprived of property without due process of law. Such service of the notice is itself "due process of law." *White v. White*, (1903) 65 N. J. Eq. 741.

"Where, however, the defendant is nonresident at the time of the proceedings for divorce, and is not served with process within the state, and does not appear, * * * a decree for alimony based solely on publication or service out of the state is a decree fixing personal liability or obligations without due process of law and is therefore void under the Federal Constitution. A decree for alimony rendered under such circumstances has generally, if not universally, been held to be without due process under constitutional provisions." *Elmendorf v. Elmendorf*, (1899) 58 N. J. Eq. 113.

various forms, and their decisions have been uniformly adverse to the validity of service in such cases as this without personal service of the defendant in the state where the suit is brought, or his voluntary appearance therein. *Bunnell v. Bunnell*, (1885) 25 Fed. Rep. 214; *U. S. v. American Bell Telephone Co.*, (1886) 29 Fed. Rep. 17, 31, 32; *Clark v. Hammett*, (1886) 27 Fed. Rep. 339; *Hankinson v. Page*, (1887) 31 Fed. Rep. 184; *Perkins v. Hendryx*, (1889) 40 Fed. Rep. 657. And even where personal service was actually made on the nonresident defendant at a time or place or under such circumstances as exempted him from service, similar rulings have been made, as where service was made in another state than that in which the suit was brought (*Parrott v. Alabama Gold L. Ins. Co.*, (1880) 5 Fed. Rep. 391; *Wilson v. Seligman*, (1888) 36 Fed. Rep. 154), or upon a nonresident while upon compulsory attendance upon a court of the state, as defendant in a criminal prosecution (*Blair v. Turtle*,

(1881) 5 Fed. Rep. 394), or as a witness (Atchison v. Morris, (1882) 11 Fed. Rep. 582; Small v. Montgomery, (1883) 17 Fed. Rep. 865), or was temporarily in the state on his way to the national capitol, as a member of Congress."

(6) *On Agent of Nonresident.* — A statute providing "that whenever suit shall be brought against any person or persons not residing in this state, but doing business therein either by a branch establishment or agency, it shall be sufficient service of a writ of summons to leave a copy thereof with any agent, or at the usual place of business of such person or persons, or his or her or their agent ten days before the return thereof," so far as it was applicable to the case, was held to be in violation of this clause.

Caldwell v. Armour, (1899) 1 Penn. (Del.) 545.

(7) *Attachment Against Nonresident Executor.* — A state statute authorizing the enforcement of a contract obligation of a nonresident who died owning real estate in such state, by attachment and sale of such real estate in an action brought against the nonresident executor, does not deprive such executor of property without due process of law.

Manley v. Mayer, (1904) 68 Kan. 377. See also Manley v. Osborne, (Kan. 1904) 76 Pac. Rep. 1130.

(8) *By Publication.* — An order of publication under a statute against a nonresident, upon a bill filed to enforce a personal demand, in which the nonresident defendants are charged as jointly and severally liable with resident defendants, is not unconstitutional under the Fourteenth Amendment as taking property without due process of law.

Kirkpatrick v. Post, (1895) 53 N. J. Eq. 591.

Notice by publication to "whom it may concern," in accordance with an Act provid-

ing for the clearing of titles to land, and the rejection of overlapping claims upon such notice, is due process of law. Tyler v. Judges, (1900) 175 Mass. 71.

(9) *Summary Process to Collect Delinquent Taxes.* — A summary process provided by statute for the sale of property for delinquent taxes, amounting to less than three hundred dollars, was held not to deprive a person of property without due process of law.

Sawyer v. Dooley, (1893) 21 Nev. 390.

(10) *Of Order to Show Cause on Attorney.* — The service upon the defendant's attorneys of an order directing a defendant to show cause why he should not be punished for his failure to pay alimony, and an order of the court pursuant to such service adjudging him to be in contempt, is a denial of "due process of law" and void.

Goldie v. Goldie, (1902) 77 N. Y. App. Div. 12.

(11) *Conclusiveness of Sheriff's Return.* — The application of a rule to the effect that a sheriff's return of personal service of a summons, included in the record of a judgment, is conclusive between the parties, and the enforcement of the judgment, do not deprive the judgment debtor of property without due process of law.

Warren v. Wilner, (1900) 61 Kan. 719.

7. Rulings of State Courts — a. ON QUESTIONS OF LAW — (1) *In General.* — In enforcing the Fourteenth Amendment the federal courts will confine themselves to the function of seeing that the fundamental principle that the citizen shall not be arbitrarily proceeded against contrary to the usual course of the law in such cases, nor punished without authority of law, nor unequally, and the like, shall not be violated in any given case; but they will not substitute their judgment for that of the state courts as to what are the laws of the state in any case.

In re King, (1891) 46 Fed. Rep. 911.

That act charged is a crime under state law. — The verdict and judgment of a state court, if the court had jurisdiction and the procedure has been regular, must be conclusive evidence that the act charged against the defendant was a crime under the laws of the state. *In re King*, (1891) 46 Fed. Rep. 909.

When by the judgment of a state court there was drawn into question the validity of an authority exercised under the United States, and the decision was erroneously against such authority, there has been a deprivation of property without due process of law. *Green Bay, etc., Canal Co. v. Patten Paper Co.*, (1898) 172 U. S. 58.

When the Parties Have Been Fully Heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law.

Central Land Co. v. Laidley, (1895) 159 U. S. 112.

The legislature of a state performs its whole duty when it provides a law for the government of its courts while exercising their respective jurisdiction, which, if followed, will furnish the parties the necessary constitutional protection, and the state cannot be deemed guilty of violating this constitutional provision simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision. *Arrow-smith v. Harmoning*, (1886) 118 U. S. 194.

When parties have had their day in court, before tribunals having jurisdiction to settle their rights, and have had a trial according to the settled course of judicial proceedings,

even if there has been a miscarriage of justice, they have not been deprived of property without due process. *Fayerweather v. Ritch*, (C. C. A. 1899) 91 Fed. Rep. 721, reversing (1898) 89 Fed. Rep. 385, and (1898) 88 Fed. Rep. 713.

When a person has been, by lawful process, arraigned upon indictment, and by lawful trial convicted of a crime in a court having the lawful right to declare his conduct to have been a crime, he has had "due process of law," and has been made to suffer "according to the law of the land," albeit the court may have made a mistake of fact or law in the progress of that particular administration of the "law of the land." *In re King*, (1891) 46 Fed. Rep. 911.

(2) *What Constitutes Defamation.* — If reputation could be deemed property within the meaning of this provision, there has been no deprivation of property without due process of law by the dismissal of an action by a state court, brought to recover damages sustained by the plaintiff on account of an alleged libel published against him by the use of a defamatory statement in the pleadings in another action to which he was not a party. If the state court erred in declaring that words used in the complaint in any suit could not be made the foundation of an action for damages, it was an error as to a matter of general law and involves no question of a federal nature.

Abbott v. Tacoma Bank of Commerce, (1899) 175 U. S. 409.

(3) *Right to Recover Interest.* — An adjudication by the state courts as to the right to recover interest must be deemed to be due process of law.

Morley v. Lake Shore, etc., R. Co., (1892) 146 U. S. 171.

(4) *On Widening City Street.* — Errors in the administration of a state statute authorizing the widening of a city street, not involving the jurisdiction of the subject and of the parties, could not justify the Supreme Court of the United States, in its re-examination of the judgment of the state court upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen the street, or whether the board of supervisors should have so declared, or whether the board of commissioners properly apportioned the costs of the work, or correctly estimated the benefits accruing to the different owners of the property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are none of them issues presenting federal questions, and the judgment of the state court upon them cannot be reviewed in the Supreme Court.

Lent v. Tillson, (1891) 140 U. S. 331.

(5) *Refusal of Habeas Corpus upon Application.* — A refusal to grant a writ of habeas corpus upon application is not a deprivation of liberty without due process of law. Laws of a state under which the officer empowered to act upon a petition can judicially determine whether upon the case made out by the petitioner it should be granted, and may refuse if in his judgment, upon the facts prescribed upon a hearing, the result would be that the prisoner would be remanded, are not in violation of this amendment.

In re Taylor, (1879) 12 Chicago Leg. N. 17, 23 Fed. Cas. No. 13,774.

(6) *Error in Deciding What Common Law Is.* — A state has the right to alter the common law at any time, although it has theretofore adopted it with certain limitations. If, through its courts, it err in deciding what the common law is, yet, if no fundamental and absolutely all-important right be thereby denied to an accused, he still has due process of law, and he cannot complain to the federal court regarding the error, assuming, of course, that the decision did not conflict with some specific provision of the Federal Constitution.

West v. Louisiana, (1904) 194 U. S. 262.

b. ON MATTERS OF PRACTICE. — A decision upon a matter of practice under the state procedure does not draw in question any right under this provision.

Thorington v. Montgomery, (1893) 147 U. S. 492.

Nol. pros. on counts jury failed to agree upon. — In the trial of a criminal case after the case had been submitted to the jury they were brought into court, and the fact disclosed, by polling them, that they were agreed upon a verdict of guilty under the first and second counts of the indictment, but could not agree as to the third and fourth counts.

Thereupon, the attorney for the state, in the presence of the jury, proposed to enter a nolle prosequi as to the third and fourth counts. The jury having been sent out, the court permitted a nolle prosequi upon those counts to be entered. Of this fact the jury were informed, and being instructed to pass only on the remaining counts, they retired, and returned into court a verdict of guilty, in manner and form as charged in the indictment. There was nothing in all this amount-

ing to a deprivation of the liberty of the defendants without due process of law. At most it was a mere error in procedure or

practice, that did not affect the substantial rights of the accused. *Cross v. North Carolina*, (1889) 132 U. S. 140.

On Issue of Lunacy. — The United States Supreme Court will accept as conclusive the ruling of a state Supreme Court that the jury which passed on the issues in a lunacy proceeding was a lawful jury; that the petition was in compliance with the statute; and that the asserted omissions in the recitals in a verdict and order thereon were at best but mere irregularities which did not render void the order of the state court appointing a guardian of the lunatic's estate.

Simon v. Craft, (1901) 182 U. S. 436.

The Denial by a State Court of an Application to Amend a Petition for removal is not the denial of any right secured by the Constitution of the United States.

Stevens v. Nichols, (1895) 157 U. S. 371.

Refusal of Application to File Supplementary Answer. — The refusal of a state court to grant an application for leave to file a supplementary answer is not a taking of property without due process of law when there is no abuse of discretion.

Sawyer v. Piper, (1903) 189 U. S. 157.

More Irregularities in the Procedure are matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the Constitution of the United States.

Iowa Cent. R. Co. v. Iowa, (1896) 160 U. S. 393.

8. Power to Punish for Contempt. — This provision was not intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether the contempt occurred in the course of a criminal proceeding or of a civil suit.

Eilenbecker v. Plymouth County, (1890) 134 U. S. 39.

The summary punishment of contempt is not a violation of the due process of law clause of the Federal Constitution. *Egan v. Lynch*, (N. Y. Super. Ct. Spec. T. 1883) 3 Civ. Pro. (N. Y.) 236.

Trial by jury. — "Due process of law" does not require that a person regularly charged with contempt who has been brought into court, has appeared in person and by counsel, has pleaded and has been tried according to the usual practice in such cases, shall be tried by a jury. *State v. Shepard*, (1903) 177 Mo. 205.

Not in presence of court — summary commitment. — A commitment for an alleged contempt, not in the presence of the court, where no rule to show cause has been issued, no notice or summons has been served, and no hearing was had, was an act of the state, through one of her judicial officers, and in

violation and disregard of the provisions of this clause. *Ex p. Stricker*, (1901) 109 Fed. Rep. 145.

Giving commissioner power to punish for contempt. — A statute of *New York* providing that a person who fails to appear at the time and place specified in a subpoena duly served upon him, or to testify or to subscribe his deposition when duly taken down, in a statutory proceeding before a commissioner, is liable to penalties which would be incurred in a like case if he was subpoenaed to attend the trial of an action in a justice's court, and giving the commissioner the powers of a justice of the peace to punish for contempt, is in violation of the due process of law clause of the Federal Constitution, in conferring upon a commissioner appointed by the courts of another state to take testimony in *New York*, power to punish and imprison for contempt witnesses appearing before him and refusing to answer. *People v. Leubischer*, (1898) 34 N. Y. App. Div. 577.

9. Statutes of Limitation — a. IN GENERAL. — The legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.

Wheeler v. Jackson, (1890) 137 U. S. 255, holding that a statute which prescribes a limitation of time within which an action may be brought by a purchaser at a tax sale to compel the execution of a conveyance, is not unconstitutional in that it requires the registrar to cancel in his office all sales made more than a certain time prior to a specified date, and provides that "thereupon the lien of all such certificates of sale shall cease and determine," and does not deprive the certificate holder of property without due process of law.

A statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed to bring an action after the passage of the statute and before the bar takes effect. *Turner v. New York*, (1897) 168 U. S. 94, holding that a *New York* statute which provides that all conveyances thereafter executed by the comptroller, of land within the forest preserves, sold by him for nonpayment of taxes and having been recorded for two years in the clerk's office in the county in which the lands lay, should, six months after the Act took effect, be conclusive evidence that all proceedings prior thereto were regular and as required by law, is not repugnant to any provision of the Constitution as to the limitation of six months. See also *Saranac Land, etc., Co. v. Comptroller*, (1900) 177 U. S. 318, (1897) 83 Fed. Rep. 436.

A limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and this opportunity must be afforded in respect of existing rights of action after they come within the present or prospective operation of the statute, and in respect of prospective rights after they accrue. "It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances. A single period cannot be fixed for all cases, because what would be reasonable in one class of cases would be entirely unreasonable in another. Each limitation must, therefore, be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and, if the time is reasonable in respect of the class, it will not be adjudged unreasonable merely because it is deemed to operate harshly in some particular

or exceptional instance; as where the person against whose right the limitation runs is under some disability, out of the state, or unavoidably prevented from suing within the time prescribed." *Lamb v. Powder River Live Stock Co.*, (C. C. A. 1904) 132 Fed. Rep. 442.

Amending statutes of limitation as to state. — An amendment to a statute of limitations providing that the statute shall never be pleaded to an action brought by or for the benefit of the state, in so far as the same affects moral claims against municipal corporations, is not violative of the due process of law clause of the Federal Constitution, although the statute of limitations had fully run prior to the amendment of the law. A city is a subordinate subdivision of the state government, and may be obligated to pay claims not strictly binding in law, if just and equitable in their character. *State v. Aberdeen*, (1904) 34 Wash. 81.

From time of recording tax deed. — A state statute providing that "no action for the recovery of real property sold for the nonpayment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded, as above provided," does not deprive one, claiming under a tax deed, of property without due process of law, when construed by the state court to mean that the limitation began to run at the time of the execution and recording of the tax deed, irrespective of the question of adverse possession. *Barrett v. Holmes*, (1880) 102 U. S. 655.

A *North Dakota* statute declaring that "all titles to real property vested in any person or persons who have been or hereafter may be in the actual, open, adverse, and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding," was held to be valid as to one who had been in the actual, open, adverse, and undisputed possession of land for nine years, and had paid the taxes and assessments levied thereon during the first eight of those years, and there remained a period of one year before his title could become good and valid; and one against whom the adverse possession was maintained was not deprived of property without due process of law by the ripening of the title by adverse possession and payment of taxes in the adverse possessor. *Schauble v. Schultz*, (C. C. A. 1905) 137 Fed. Rep. 391.

When Actions May Be Immediately Barred. — When reasonable opportunity has been offered, by a statute taking private property for public use, to the owners to

obtain compensation for the damages sustained, they must be deemed to have waived their right to assert it, and a statute passed after that lapse of time, providing that all claims and causes of action then existing upon which no proceeding had been already taken should be barred, did not deprive such owners of property without due process of law.

Kaukauna Water Power Co. v. Green Bay, etc., Canal Co., (1891) 142 U. S. 280, *affirming* *Green Bay, etc., Canal Co. v. Kaukauna Water-Power Co.*, (1888) 70 Wis. 635.

b. REMOVAL OF BAR. — A debtor has no property in the bar of a statute of limitation as a defense to his promise to pay a debt, and such a bar, after it has become complete, may be removed by statute. In an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative Act passed after the bar has become perfect, such Act deprives the party of his property without due process of law. The reason is that, by the law in existence before the repealing Act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the Act the effect of transferring this title to plaintiff would deprive him of his property without due process of law. But to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.

Campbell v. Holt, (1885) 115 U. S. 623.

10. Relating to Crimes — a. KNOWLEDGE AS ELEMENT OF CRIME — (1) In General. — A statute punishing incest does not violate the due process of law clause of the Federal Constitution, in that it does not employ the word "knowingly" or any equivalent word or phrase to make knowledge of the relationship an element of the crime.

State v. Glindemann, (1904) 34 Wash. 221.

(2) Presumption from Possession. — A state statute which makes the possession by persons other than public officers, of papers or documents, being the record of chances or slips, or the possession of any paper, print, or writing commonly used in playing or promoting the game of policy, presumption of possession thereof knowingly, in violation of the statute, does not deprive a citizen of liberty without due process of law.

Adams v. New York, (1904) 192 U. S. 599, *affirming* *People v. Adams*, (1903) 176 N. Y. 351.

b. COMBINATION TO MALICIOUSLY INJURE ANOTHER. — A state statute which imposes imprisonment or fine on "any two or more persons who shall combine * * * for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession by any means whatever," etc., as construed by the state Supreme Court to apply to a case of malicious injury from disinterested malevolence, was held to be valid.

Aikens v. Wisconsin, (1904) 195 U. S. 206, wherein the court said: "Thus limited, on whatever ground, the statute would punish only combinations of a kind for which no justification could be offered and those which were taken out of the justification by the

motive with which they were made. We see no sufficient reason to believe that the court will go farther or construe the Act in such a way as to raise questions which we need not go into here. Therefore it is unnecessary to consider whether, on a more literal con-

struction, the portion dealing with malicious intent could be separated from that which deals with the purpose of merely wilful injury, and saved, even if the latter were held

to go too far. Probably the two phrases will be read together and the statute made unquestionable as a whole."

c. PROHIBITING THE CARRYING OF WEAPONS. — The following statute of a state was held not to violate this clause: "If a person carry about his person any revolver or other pistol, dirk, bowie-knife, razor, slung-shot, billy, metallic or other false knuckles, or any other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor, and fined not less than twenty-five nor more than two hundred dollars, and may, at the discretion of the court, be confined in jail not less than one nor more than twelve months; and if any person shall sell or furnish any such weapon as is hereinbefore mentioned to a person whom he knows, or has reason, from his appearance or otherwise, to believe, to be under the age of twenty-one years, he shall be punished as hereinbefore provided. But nothing herein contained shall be so construed as to prevent any person from keeping or carrying about his dwelling-house or premises any such revolver or other pistol, or from carrying the same from the place of purchase to his dwelling-house, or from his dwelling-house to any place where repairing is done, to have it repaired, and back again. And if upon the trial of an indictment for carrying any such pistol, dirk, razor, or bowie-knife the defendant shall prove to the satisfaction of the jury that he is a quiet and peaceable citizen, of good character and standing in the community in which he lives, and at the time he was found with such pistol, dirk, razor, or bowie-knife, as charged in the indictment, he had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person, and that he was, in good faith, carrying such weapon for self-defense and for no other purpose, the jury shall find him not guilty."

State v. Workman, (1891) 35 W. Va. 367.

d. ORDINANCE REQUIRING REMOVAL OF WEEDS. — A city ordinance making any owner or occupant of a lot who shall allow to remain thereon any growth of weeds to the height of over one foot, guilty of a misdemeanor, and providing for a trial by jury according to the settled course of judicial proceedings, does not deprive any person of liberty or property without due process of law.

St. Louis v. Galt, (1903) 179 Mo. 8.

11. Public Office and Officers — a. IN GENERAL. — Public office is not property, and the determination of the general assembly as to the right to the office of governor of a state is not open to judicial review.

Taylor v. Beckham, (1900) 178 U. S. 574. See also *State v. Crumbaugh*, (1901) 26 Tex. Civ. App. 521.

A law to determine title to a judicial office does not deprive an incumbent of property without due process of law, when ample provision has been made for the trial of the contest before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notify-

ing him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the state, and for hearing and judgment there. *Kenard v. Louisiana*, (1875) 92 U. S. 483.

Abolition of office created by legislature. — It is no deprivation of property without due process of law for a legislature to abolish

an office which it had created, although the legislature had prohibited the removal of such an officer except for cause after due trial. *Hawkins v. Roberts*, (1898) 122 Ala. 130.

Difference in compensation of justices of fixed classes.—An Act providing that no justice of the peace except station-house jus-

tices shall receive from the county more than ten thousand dollars for his services in any one month in criminal cases, does not deprive the justices whose salary is thus limited, of property without due process of law. *Herbert v. Baltimore County*, (1903) 97 Md. 639.

b. REMOVAL FROM OFFICE.—A state statute regulating proceedings for the removal of a person from a state office is not repugnant to the Constitution of the United States if it provides for bringing the party against whom the proceeding is had into court and notifying him of the case he has to meet, for giving him an opportunity to be heard in his defense, and for the deliberation and judgment of the court.

Foster v. Kansas, (1884) 112 U. S. 206.

A state auditor, whose office was substantially an administrative one, has not been deprived of property without due process of law on being removed from the office by the governor of the state, when the state court has held that the statute authorizing the governor to remove him is not in violation of the constitution of the state and that the hearing before the governor was sufficient. *Wilson v. North Carolina*, (1898) 169 U. S. 592.

Suspension of railroad commissioner by statutory proceeding.—The suspension from office of a railroad commissioner by the governor, in accordance with the requirement of a statute forbidding any railroad commissioner to become interested in any railroad, does not deprive him of his property without due process of law as guaranteed by the Fourteenth Amendment, where the commis-

sioner was informed by letter of his violation of the statute and notified to appear, and did appear, although the governor acted without sworn testimony, or hearing testimony in favor of the commissioner. *Caldwell v. Wilson*, (1897) 121 N. Car. 425.

Removal of police officers by city alderman.—A clause of a city charter providing that "the members of the paid police department of said city shall not be subject to removal from office at any time except for misconduct or incapacity of such a character as the board of aldermen may deem a disqualification for said office, and all such removals shall be by the board of aldermen, upon charges made in writing and of which the officer complained of shall have had notice and opportunity to be heard thereon," is not repugnant to the due process of law clause of the Federal Constitution. *Lowrey v. Central Falls*, (1901) 23 R. I. 354.

c. FUND APPROPRIATED FOR BENEFIT OF PUBLIC OFFICERS.—A state statute, in providing for the appointment, regulation, and payment of the police force of a city, declared that the compensation of the members of the police force should not exceed one hundred and two dollars a month for each one, and that the treasurer of the city should "retain from the pay of each police officer the sum of two dollars per month, to be paid into a fund to be known as the 'police life and health insurance fund.'" A later statute entitled "An Act to create a police relief, health, and life insurance and pension fund in the several counties, cities and counties, cities and towns of the state," repealed the above Act. In an action brought by the personal representative of a police officer whose death occurred subsequent to the latter statute, it was held that though the two dollars retained was called in the statute a part of an officer's compensation, it was in fact an appropriation of that amount by the state each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designated, could be transferred to other parties and applied to different purposes by the legislature; and that the latter statute did not deprive him of property without due process of law.

Pennie v. Reis, (1889) 132 U. S. 464.

12. Franchise as Property. — A ferry franchise is property entitled to the protection of the law.

Louisville, etc., *Ferry Co. v. Kentucky*, (1903) 188 U. S. 395.

13. License as Property. — A license to pursue any business or occupation, from the governing authority of any municipality or state, can only be invoked for the protection of one in the pursuit of such business or occupation, as long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

Gray v. Connecticut, (1895) 159 U. S. 77.

A license to sell liquors for the term of one year, granted by a municipal board of excise, is not such a property right of which the licensee cannot be deprived before the expiration of the term. The state cannot, through its legislative and administrative officers, enter into a contract hampering the future action of the state, in the exercise of its police power to regulate, restrict, or prohibit the traffic in intoxicating liquors. The state cannot barter away, or in any manner abridge, any of those inherent powers of government, the complete and untrammelled exercise of which is essential to the welfare of organized society, and any contracts to

that end are void upon general principles, and cannot be protected by the provisions of the National Constitution. *Kresser v. Lyman*, (1896) 74 Fed. Rep. 766.

A law interfering with rights which existed under a license that has expired before the law goes into effect does not violate any right protected by the Fourteenth Amendment of the Federal Constitution. Consequently the trial and conviction of a merchant for selling in violation of a statute, and after the expiration of his license, pistols which he had purchased during the continuance of his license, does not deprive him of his property without due process of law. *State v. Burgoyne*, (1881) 7 Lea (Tenn.) 173.

14. Incidental Injury to Property. — Complaint was made by an abutting property owner that by a municipal ordinance authority had been given to a railway company to obstruct the street with tracks, sheds, fences, etc., except as to pedestrians, for whom the company was required to provide by overhead bridge and stairway approaches thereto, and that by means of this obstruction travel along the streets was obstructed and the property rights of the petitioner were not only substantially injured, but practically destroyed. It was held that the damage complained of was the incidental consequence of a lawful exercise of municipal authority and did not amount to taking property without due process of law.

Meyer v. Richmond, (1898) 172 U. S. 82.

15. Summary Destruction of Property — *a. IN GENERAL.* — In determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or the health of the community, due process of law may authorize its summary destruction.

Sentell v. New Orleans, etc., R. Co., (1897) 166 U. S. 705.

b. PROPERTY ILLEGALLY USED. — A state statute providing that any net, etc., maintained in violation of any law for the protection of fisheries is to be

treated as a nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same," is not invalid for failing to provide for regular judicial proceedings to be instituted for its condemnation when its value is inconsiderable.

Lawton v. Steele, (1894) 152 U. S. 135.

The destruction of property in the exercise of the police power of a state, when such property is used in violation of law, in main-

taining a public nuisance, is not a taking of property for public use, and does not deprive the owner of it without due process of law. *Cantini v. Tillman*, (1893) 54 Fed. Rep. 975.

16. Relating to Presumptions—*a*. ON PRESUMPTION OF DEATH FROM LENGTH OF ABSENCE.—A statute providing that upon application made to the register of wills for letters of administration upon the estate of any person supposed to be dead on account of absence for seven or more years from the place of his last domicile within the state, the register of wills shall certify the application to the Orphans' Court, and that said court, if satisfied that the applicant would be entitled to administration if the absentee were in fact dead, shall cause the fact of application to be advertised in a newspaper published in the county once a week for four successive weeks, giving notice that on a day stated, which must be two weeks after the last publication, evidence will be heard by the court concerning "the alleged absence of the supposed decedent and the circumstances and duration thereof," does not constitute a want of due process of law.

Cunnius v. Reading School Dist., (1905) 198 U. S. 469.

A statute which authorizes administration on the estates of absent persons who have "not been heard from directly or indirectly for the term of seven years" operates as a taking of property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. *Carr v. Brown*, (1897) 20 R. I. 215.

Probate proceedings on the estate of a person supposed to be dead, but who is in fact alive, are invalid, and a judgment of a state court affirming a sale thereunder of land owned by such a person deprives him of property without due process of law. *Scott v. McNeal*, (1894) 154 U. S. 38.

Reviewing the above case, the court, in *Cunnius v. Reading School Dist.*, (1905) 198 U. S. 469, noted *supra*, said: "In that case a probate court in the state of Washington had issued letters of administration upon the estate of a person who had disappeared, and proceeded to administer his estate as that of a dead person upon the presumption of death, which the court assumed had arisen from his absence. There was no statute of the state of Washington providing for an administration of the estate of an absentee as such, and creating rights and safeguards applicable to that situation, as distinct from the general law of the state, conferring upon courts of probate power to administer the estates of deceased persons. Referring to the

presumption under the law of England of death arising from absence, it was held that such presumption was not conclusive, and was absolutely rebutted by proof that the person who was presumed from the fact of absence to be dead was, in fact, alive. Having established this proposition, it was then held, as death was essential to confer jurisdiction on a probate court to administer an estate as such, the fact of life at the time the administration was initiated conclusively rebutted the presumption and caused the court to be wholly without jurisdiction to administer the estate of a person who was alive."

Recovery of bank deposit.—A person made a deposit in a bank, and left the state. Eleven years thereafter, on application to the surrogate, letters of administration were granted upon a finding by the surrogate that the depositor was deceased and had died intestate. The administrator presented his letters of administration to the bank and demanded the amount deposited, with accrued interest, and the bank thereupon paid the same to him. In an action by the depositor against the bank, it was held that these proceedings, conforming to state statutes, constituted no defense, as there was an absence of "due process of law." That the state may make a law for taking care of abandoned estates, with proper provisions for notice to the absent or unknown owners, will not be denied, but this is not such a law. *Lavin v. Emigrant Industrial Sav. Bank*, (1880) 1 Fed. Rep. 641.

***b*. PRESUMPTION OF NEGLIGENCE.**—The enforcement of a statute which provides that "any person who drives a herd of horses, mules, asses, cattle,

sheep, goats, or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway," does not constitute a taking of property without due process of law.

Jones v. Brim, (1897) 165 U. S. 180, *affirming* *Brimm v. Jones*, (1895) 11 Utah 200, 13 Utah 440.

C. PRESUMPTION OF VALUE OF PROPERTY LOST BY FIRE. — A state statute relating to fire insurance contracts, which directs that "in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant," does not deprive insurance companies of property without due process of law as precluding the judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

Orient Ins. Co. v. Daggs, (1899) 172 U. S. 564, *affirming* *Daggs v. Orient Ins. Co.*, (1896) 136 Mo. 382.

17. Regulating Priorities—*a.* DISPLACING PRIORITY OF LIENS. — A statute provided that no railroad company should have power to give any mortgage or other kind of lien on its property which would be valid and binding against judgments for damages done to persons and property in the operation of the road. Such a law is valid, as the law in force at the time the mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage.

East Tennessee, etc., R. Co. v. Frazier, (1891) 139 U. S. 288. See also *Southern R. Co. v. Bouknight*, (C. C. A. 1895) 70 Fed. Rep. 442, *affirming* *Central Trust Co. v. Charlotte, etc., R. Co.*, (1894) 65 Fed. Rep. 257.

***b.* PRIORITY OF RESIDENT CREDITORS.** — A state statute which provides that "creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors being residents of any other country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments," does not deprive a nonresident mortgagee of his property without due process of law.

Sully v. American Nat. Bank, (1900) 178 U. S. 299.

A State Statute Which Subordinates the Claims of Private Business Corporations not within the jurisdiction of the state to the claims of creditors residing in the state does not deprive such a corporation of property without due process of law, when it had notice of the proceedings in the state court, became a party to those proceedings, and the rights asserted by it were adjudicated, but it was only denied the right to participate upon terms of equality with state creditors in the

distribution of particular assets of another corporation doing business in that state.

Blake v. McClung, (1898) 172 U. S. 260. See also *Blake v. McClung*, (1900) 176 U. S. 59.

c. GIVING PREFERENCE TO CERTAIN STOCKHOLDERS ON LIQUIDATION. — A statute provided that "all charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal, at the will of the legislature, unless a contrary intent be therein plainly expressed: provided that, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." A provision of an amendment to a railroad company's charter that "the proceeds of such sale, lease, or consolidation which the company by said amendment are authorized to make, shall be first applied to pay off debts said company may owe, and the balance applied towards the liquidation and discharge, ratably, of the bonds issued by the Glasgow precinct and by the town of Glasgow to aid in building said road," was held to be unconstitutional as depriving other stockholders than the municipal corporation of vested rights.

Hill v. Glasgow R. Co., (1888) 41 Fed. Rep. 617, wherein the court said: "After the payment of debts, corporate assets belong to and must be distributed equally and ratably among the stockholders therein, as the beneficial owners thereof. This equality of ownership and right of ratable distribution in surplus assets of the corporation, acquired before amendment or repeal of the company's charter, cannot be defeated or impaired by such amendment or repeal. It is a valid right of

property, which does not fall within the power to deal with the privileges and franchises of the corporation. The legislature could not, by repeal or amendment of the charter, bestow all the surplus property of the corporation upon certain stockholders to the exclusion of others; nor could it lawfully direct that such corporate property or funds should be applied to the payment of the indebtedness of a portion of the stockholders of the company."

d. GIVING WATER RENTS PRIORITY OF LIEN. — A statute making water rents due to a city a lien prior to all other incumbrances, in the same manner as taxes and assessments, does not deprive a mortgagee of property without due process of law when the mortgage was made after the enactment of the statute, nor does a statute passed subsequent to the mortgage, imposing a penalty for failing to pay the rents by a certain time, and a heavy rate of interest on their continuing in arrear.

Provident Sav. Inst. v. Jersey City, (1885) 113 U. S. 506, wherein the court said: "We are not prepared to say that a legislative Act giving preference to * * * liens even over those already created by mortgage, judgment, or attachment, would be repugnant to the Constitution of the United States. * * * The providing a sufficient water supply for the inhabitants of a great and growing city is one of the highest functions of municipal government, and tends greatly to enhance the value

of all real estate in its limits; and the charges for the use of the water may well be entitled to take high rank among outstanding claims against the property so benefited. It may be difficult to show any substantial distinction in this regard between such a charge and that of a tax strictly so called. But as the present case does not call for an opinion on this point, it is properly reserved for consideration when it necessarily arises."

18. Anti-trust Laws.—Statutes which are directed to the prohibition of combinations to restrict trade, or in any way limit competition in the production or sale of articles, or to increase or reduce their price in order to preclude a free and unrestrained competition in them, enumerating and forbidding the

various ways in which these purposes can be accomplished, do not violate this clause of the Federal Constitution.

National Cotton Oil Co. v. Texas, (1905) 197 U. S. 115. See also *Texas Brewing Co. v. Durrum*, (Tex. Civ. App. 1898) 46 S. W. Rep. 880. But see *In re Grice*, (1897) 79 Fed. Rep. 637, reversed in *Baker v. Grice*, (1898) 169 U. S. 284, on the ground that no such urgency was shown as to justify a federal court releasing on habeas corpus a person held on process of a state court, and that the petitioner should be left to the regular course of justice in the state court and the remedy by writ of error from the United States Supreme Court.

An Iowa statute providing that it shall be unlawful for two or more fire insurance companies doing business in that state, or for the officers, agents, or employees, to make or enter into any combination or agreement relating to the rates to be charged for insurance, the amounts of commissions to be allowed agents for procuring the same, or the manner of transacting fire insurance in that state, was held to be unconstitutional as depriving the companies of the liberty to contract. In this case there was no question as to any combination or conspiracy to accomplish any desired purpose. *Greenwich Ins. Co. v. Carroll*, (1903) 125 Fed. Rep. 122.

A Kansas statute provides: "A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: First. To create or carry out restrictions in trade or commerce or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state. Second. To increase or reduce the price of merchandise, produce, or commodities, or to control the cost or rates of insurance. Third. To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce. Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use, or consumption in this state. Fifth. To make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption, below a common standard figure, or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure, or by which they shall in any manner establish or settle the price of any article, or commodity, or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or

commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful and void." The statute is valid as applied to a person charged with entering into an agreement, contract, and combination with grain dealers and buyers to pool and fix the price they should pay for grain, and to divide between them the net earnings, and to prevent competition in the purchase and sale of grain. *Smiley v. Kansas*, (1905) 196 U. S. 447, wherein the court said: "Undoubtedly there is a certain freedom of contract which cannot be destroyed by legislative enactment. In pursuance of that freedom parties may seek to further their business interests, and it may not be always easy to draw the line between those contracts which are beyond the reach of the police power and those which are subject to prohibition or restraint. But a secret arrangement by which, under penalties, an apparently existing competition among all the dealers in a community in one of the necessities of life is substantially destroyed, without any merging of interests through partnership or incorporation, is one to which the police power extends." *Affirming* (1902) 65 Kan. 240. See also *State v. Schlitz Brewing Co.*, (1900) 104 Tenn. 715.

A Nebraska statute declared that any combination of capital or skill, or acts by which persons seek to fix the price of any article, commodity, use, or merchandise, with the intent to prevent others in a like business or occupation from conducting the business or occupation, is a trust, and especially so as to any of the following things: Restrictions in trade; to limit the production or increase or reduce the price of any commodity; to prevent competition in insurance, or in the making, transportation, sale, or purchase of any article; to fix any standard whereby its price to the public shall in any manner be established; to enter into any contract by which a party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any sum. The statute declared that any persons violating the statute should be conspirators, and punished accordingly, and any corporation of the state violating the statute should have its corporate existence declared forfeited by suit. It was held that the statute was void as depriving persons of the power to contract. "If this statute is valid, two men in the same line of business in the same town or village cannot form a partnership if it tends to maintain prices. They must continue, each for himself, until one or the other or both are destroyed. Neither can a stock company nor a corporation be formed by two or more if, by so doing, the price is maintained." *Niagara F. Ins. Co. v. Cornell*, (1901) 110 Fed. Rep. 823.

An Ohio statute entitled "An Act to define trusts and provide for criminal penalties in civil damages, and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in the state," in so far as it forbids independent corporations to enter into combinations to restrict competition in trade with a view to exacting from consumers higher prices than would prevail under the conditions of open competition, is not void as an interference with the power to make contracts, as the guaranty of such liberty is limited by the public welfare or the exercise of the police power. *State v. Buckeye Pipe Line Co.*, (1900) 61 Ohio St. 520.

An Ohio statute which, literally construed, makes it criminal for two or more persons, firms, partnerships, etc., to make or carry out any contract, obligation, or agreement, by which they combine or agree not to sell any article below a standard or common figure; to fix values and to keep the price of

such articles at a fixed or graduated figure; to settle the price of any article between themselves, or between themselves and others; to exclude all free and unrestricted competition among themselves, or among themselves and others, either in selling to or purchasing from others, is unconstitutional as invading the liberty of a person to contract. *Gage v. State*, (1903) 24 Ohio Cir. Ct. 724, in which case the court said: "The fault of the Act under consideration is, that it is too general. It makes no distinction between legal and illegal combinations and agreements which prevent competition, or are in restraint of trade. Contracts which have always been embraced in those inalienable rights essential to the liberty of the citizen are made criminal equally with those which the law has always condemned. Statutes prohibiting all contracts or agreements which prevent competition under all circumstances are infringements of the constitutional liberty of the citizen. All contracts which are in restraint of trade, or prevent competition, are not illegal."

Preliminary Examination of Witnesses under Anti-trust Law. — A proceeding upon the written application of the county attorney or attorney-general, under the Kansas anti-trust law, to subpoena witnesses to testify of their knowledge of violations of that law, is in the nature of an investigation, or preliminary proceeding, and is a valid exercise of the judicial power, the procedure being "due process" of law within the meaning of the Fourteenth Amendment of the Federal Constitution.

State v. Jack, (1904) 69 Kan. 387.

19. Relation of Employer and Employee — a. REGULATING PAYMENT OF WAGES. — A statute entitled "An Act to provide for the protection of servants and employees of railroads," relating to the payment of unpaid wages without abatement or deduction on discharge of an employee, does not amount to deprivation of property, as the Act is purely prospective in its operation. It does not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it imposes a duty in reference to the payment of wages actually earned, which restricts future contracts in the particular named.

St. Louis, etc., R. Co. v. Paul, (1899) 173 U. S. 409, affirming (1897) 64 Ark. 83.

Requiring payment of wages in money. — An Act prohibiting wages except in lawful money and making any contract for any other manner of payment illegal, is not a deprivation of property without due process of law. *State v. Haun*, (1898) 7 Kan. App. 509.

Weekly payment laws. — A *Rhode Island* statute providing that "every corporation, other than religious, literary, or charitable corporations, and every incorporated city, but not including towns, shall pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by

inevitable casualty: provided, however, that if at any time of payment any employee shall be absent from his regular place of labor, he shall be entitled to said payment at any time thereafter on demand," was held to be valid. *State v. Brown, etc., Mfg. Co.*, (1892) 18 R. I. 16.

In specifications for municipal contracts. — A municipal ordinance providing "that all specifications prepared by the head of any of the departments of the executive branch of the municipality of Cleveland for any public work or improvement and upon which, under proper advertisement, bids shall be received for the performance of such work or the making of any such improvement, such specifications shall have inserted therein, a

clause providing that any and all common labor performed on such work or the making of any such improvement as may be contemplated, and in pursuance of any such specifications, shall receive not less than one dollar

and fifty cents per day, and that the hours of labor of such common labor shall not exceed eight hours per day," was held to be an invasion of the liberty to contract. *State v. Norton*, (1897) 7 Ohio Dec. 358.

b. REDEMPTION OF STORE ORDERS IN CASH. — A statute which, with provisos, declares "that all persons, firms, corporations, and companies, using coupons, scrip, punch-outs, store orders, or other evidence of indebtedness to pay their or its laborers and employees, for labor or otherwise, shall, if demanded, redeem the same in the hands of such laborer, employee, or *bona fide* holder, in good and lawful money of the United States," is valid.

Knoxville Iron Co. v. Harbison, (1901) 183 U. S. 18, *affirming* (1899) 103 Tenn. 421. See also *Dayton Coal, etc., Co. v. Barton*, (1899) 103 Tenn. 604.

A West Virginia statute prohibiting any corporation, company, firm, or person engaged in any trade or business, either directly or indirectly, to issue, sell, give, or deliver to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness payable or redeem-

able otherwise than in lawful money; and, if such scrip, token, draft, check, or other evidence of indebtedness be so issued, sold, given, or delivered to such laborer, it shall be construed, taken, and held in all courts and places to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm, or person issuing, selling, giving, or delivering the same to the person named therein or to the holder thereof, was held not to be so plainly and obviously in violation of the Constitution as to justify a court to declare it void. *State v. Peel Splint Coal Co.*, (1892) 36 W. Va. 802.

c. PROHIBITING ASSIGNMENT OF WAGES. — An Act prohibiting the assignment of wages to become due to employees and making of no effect any agreement by which the employer would be relieved of the obligation to pay such wages, is not a deprivation of property without due process of law.

International Text-Book Co. v. Weisinger, (1903) 160 Ind. 349.

d. REGULATING HOURS OF LABOR — (1) *Eight-hour Laws for Miners.* — A state statute providing that the period of employment of workmen in all underground mines or workings, and in smelters and all other institutions for the reduction or refining of ores or metals, shall be eight hours per day, except in cases of emergency where life or property is in imminent danger, is not a deprivation of property without due process of law. These employments when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

Holden v. Hardy, (1898) 169 U. S. 380, wherein the court said: "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid." *Affirming State v. Holden*, (1896) 14 Utah 71.

A Nevada statute providing that "the period of employment of workmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger," and that "the period of employment of workmen in smelters and in all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger," was held to be within the power and discretion of the legislature to enact for the protection of the health and prolongation of the lives of the workmen affected, and the resulting welfare of the state. *Ex p. Boyce*, (1904) 27 Nev. 299.

It is not competent for a state to single out the mining, manufacturing, and smelting industries of the state, and impose upon them restrictions with reference to the hours of labor of their employees from which other

employers of labor are exempt. It violates the right of parties to make their own contracts, a right protected by this clause. *In re Eight-Hour Bill*, (1895) 21 Colo. 30.

(2) *Ten-hour Labor Law for Bakers.* — A statute providing that "no employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work," was held to be invalid as depriving persons of liberty to contract.

Lochner v. New York, (1905) 198 U. S. 52, wherein the court said: "The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the Act would be innocent. * * * We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provision of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

* * * It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution." *Reversing* (1904) 177 N. Y. 145.

(3) *Ten-hour Law for Railroad Employees and Telegraph Operators.*

A statute declaring that ten hours shall constitute a day's work and that the class of employees specified in the Act shall be paid for every hour in excess of ten which they shall be required or permitted to work, in addition to their *per diem*, is unconstitu-

tional as interfering with the right of contract and as taking property without due process of law. *Wheeling Bridge, etc., R. Co. v. Gilmore*, (1894) 4 Ohio Cir. Dec. 366, 8 Ohio Cir. Ct. 658.

e. **REGULATING SCREENING AND WEIGHING COAL.** — A statute relating to weighing and measuring coal at the place where mined before the same is screened, providing that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine, before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same, that coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and that the price paid for each bushel so ascertained shall be such as may be agreed on as aforesaid, was held not to be so plainly and obviously in violation of the Constitution as to justify a court in declaring it void.

State v. Peel Splint Coal Co., (1892) 36 W. Va. 802.

f. **WAIVER OF RIGHT TO DAMAGES FOR INJURIES.** — A state statute which provides: "And no railroad company, insurance company, or association of other persons shall demand, expect, require, or enter into any contract, agreement, or stipulation with any other person about to enter, or in the employment of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising from personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever, and all such stipulations or agreements shall be void," in denying to the employees of a railroad corporation the right to make their own contracts concerning their own labor, deprives them of liberty without due process of law.

Shaver v. Pennsylvania R. Co., (1896) 71 Fed. Rep. 936.

g. **PROHIBITING CONTRACTS INTERFERING WITH MEMBERSHIP IN LABOR ORGANIZATIONS.** — A statute provided: "No employer, superintendent, foreman, or other person exercising superintendence or authority over any mechanic, miner, engineer, fireman, switchman, baggageman, brakeman, conductor, telegraph operator, laborer, or other workingman, shall enter into any contract or agreement with any such employer requiring said employee to withdraw from any trade union, labor union, or other lawful organization of which said employee may be a member, or requiring said employee to refrain from joining any trade union, labor union, or other lawful organization, or requiring any such employee to abstain from attending any meeting or assemblage of people called or held for lawful purposes, or shall by any means attempt to compel or coerce any employee into withdrawal from any lawful organization or society." It was held that this statute violated the right to acquire property by labor and by contract, and was therefore repugnant to the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.

State v. Julow, (1895) 129 Mo. 163.

An Act to protect "union" men by making it a criminal offense for an employer to attempt to prevent his employees from joining

labor organizations, or to discharge them because of their connection with labor unions, violates the due process of law clause of the Federal Constitution. *Gillespie v. People*, (1900) 188 Ill. 176.

h. **PROHIBITING BLACKLISTING EMPLOYEES.** — The provision of a state statute was as follows: "No company, corporation, or partnership in this state shall authorize, permit, or allow any of its or their agents to, nor shall any of its or their agents, blacklist any discharged employee or employees, or by word or writing seek to prevent, hinder, or restrain such discharged employee or any employee who may have voluntarily left such company's or person's service from obtaining employment from any other person or company." It was held that this provision, inasmuch as it does not interfere with the right of the employer to discharge an employee, or his right to communicate to other employers the nature and character of his employees when such information would be for their interests, is not in violation of the Fourteenth Amendment.

State v. Justus, (1902) 85 Minn. 279.

20. Relation of Mortgagor and Mortgagee — a. TITLE OF MORTGAGEE IN POSSESSION. — A statute, entitled "An Act in regard to judgments and decrees, and the manner of enforcing the same by execution, and to provide for the redemption of real estate sold under execution or decree," provides in part: "When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery, or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this Act, a deed may be given within two years from the time this Act shall take effect. When such deed is not taken within the time limited by this Act the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take deed." The state Supreme Court held that the Act "applies to mortgagees in possession, and that it operates not simply as a statute of limitations on the right to obtain a deed, but in effect as a statute forfeiting, by the nullification of the certificate, the mortgagee's estate and right of possession by reason of laches, and means that if a deed be not taken out within the time specified, the mortgagee has lost his debt and the mortgagor has been reinstated in his former title by operation of law, and without having paid anything in redemption." As so construed the statute deprives a mortgagee in possession of property without due process of law when at the time of its enactment the title had passed according to the law of the state in respect to mortgages.

Bradley v. Lightcap, (1904) 195 U. S. 16, *reversing* (1900) 186 Ill. 510, and (1903) 201 Ill. 511.

b. AFFECTING REMEDY OF MORTGAGEE. — There has been no deprivation of property without due process of law by the enactment of a statute subsequent to the execution of a mortgage which solely affects the remedy, and does not substantially alter those rights of the mortgagee or his representatives which existed when the mortgage was made.

Red River Valley Nat. Bank v. Craig, (1901) 181 U. S. 552.

c. NECESSITY FOR SEIZURE ON FORECLOSURE. — In suits for the foreclosure of a mortgage or other lien upon real estate, no preliminary seizure is necessary to give the court jurisdiction. All cases in which it has been held that the seizure, or its equivalent, and attachment or execution upon the property, is necessary to give jurisdiction are those where a general creditor seeks to establish a foreclosure and lien thereby acquired.

Roller v. Holly, (1900) 176 U. S. 405, *reversing* (1896) 13 Tex. Civ. App. 636.

21. Relating to Corporations and Stockholders — a. MODIFYING CORPORATE PRIVILEGES AND FRANCHISES. — A state legislature may change or modify privileges and franchises which the state has granted to a corporation, and which concern the interests of the public; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further, and so legislate as to disturb, affect, or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised.

Hill v. Glasgow R. Co., (1888) 41 Fed. Rep. 616.

b. LEASE BY CORPORATION AFFECTING DISSENTING STOCKHOLDER. — A lease by one corporation to another corporation of its property and franchise when the Act under which both of these corporations were organized, and the legislation existing at the time, expressly conferred upon those corporations from the beginning of their existence the power to be either lessor or lessee, does not deprive a dissenting stockholder of property without due process of law. Every stockholder, in subscribing for his stock, took it subject to the conditions of the Act under the authority by which it was issued, and of the relevant provisions of law existing at the time, and was bound by their several requirements and conditions.

Dickinson v. Consolidated Traction Co., (1902) 114 Fed. Rep. 252.

c. PAYMENT OF COMMISSIONERS BY CORPORATIONS TO BE REGULATED. — A statute requiring the salaries and expenses of a board of subway commissioners to be borne by the several corporations owning or operating electrical lines within the city, does not deprive the owners of such lines of property without due process of law.

New York v. Squire, (1892) 145 U. S. 191.

d. EXPENSES OF LIQUIDATION TO BE PAID OUT OF ASSETS. — A statute requiring all persons or companies now engaged or that may hereafter engage in issuing contracts and providing for the redemption or fulfilling thereof by the accumulation of a fund from contributions by the holders of such contracts, or providing for the maturing or fulfilling of such contracts in the order of their issue, or in some other fixed or arbitrarily determined manner, or providing for paying money or giving property represented to be of greater value than the amount paid under such contract, with the net earnings added, or providing for the loaning of funds contributed by the holders of such contracts in any fixed or arbitrarily determined order or manner, or for making loans to such subscribers from such funds to be paid in instalments, for the protection of the subscribers or holders of such contracts, to comply with certain conditions, does not deprive a company engaged in such business of its property without due process of law in providing that a receiver and his attorney, appointed to wind up the affairs of the company, shall be paid for their services out of the assets.

State v. Preferred Tontine Mercantile Co., (1904) 184 Mo. 160, in which case the court said: "No right is taken away from the defendant, except as the result of a judgment of a court of competent jurisdiction after notice and hearing. The fact that the receiver and his attorney are paid out of the assets

administered upon does not constitute the taking of the defendants' property without due process of law. Such allowances have ever been made in cases of receivership, and are properly made, for otherwise the court would be helpless to enforce its decrees."

e. ENFORCEMENT OF STOCKHOLDER'S LIABILITY. — Under the provisions of a statute entitled "An Act to provide for the better enforcement of the liability of stockholders of corporations," the District Court is authorized to proceed, upon notice given as such court may direct, to ascertain the probable indebtedness of a corporation which has made an assignment under the laws of the state for the benefit of its creditors, or for which a receiver in insolvency has been appointed, and the expenses of such assignment or receivership, and the probable amount of assets available for the payment thereof, and also as to what parties are or may be liable as stockholders, and the nature and extent of such liability; and if, on such ascertainment, it appears to the court that the assets are insufficient to meet the indebtedness and expenses of the trust, it is authorized and directed to levy a ratable assessment upon all parties liable as stockholders, or on account of stock shares, for such an amount, proportion, or percentage of the liability as in its discretion such court may deem proper; and the order and assessment so levied is made conclusive upon and against all parties so liable as to all matters relating to the amount of, the propriety of, and the necessity for, such an assessment. It was held that these provisions are not in violation of any provision of the Constitution of the United States in that a judicial proceeding is thereby authorized without due process of law.

Straw, etc., Mfg. Co. v. L. D. Kilbourne Boot, etc., Co., (1900) 80 Minn. 125.

f. EXECUTION AGAINST MEMBERS OF LIMITED PARTNERSHIP ASSOCIATION. — The issuance, in accordance with statute, of an execution against the members of a limited partnership association to the extent of their unpaid subscriptions to the stock, upon the return of an unsatisfied execution issued against the association, does not deny to such members due process of law.

Rouse v. Donovan, (1895) 104 Mich. 234.

g. MAKING DIRECTORS SURETIES FOR CODIRECTORS AND OFFICERS. — A provision of a state constitution making corporate directors sureties for their codirectors and for the officers of the corporation, for moneys so misappropriated as to render the defaulting officer guilty of a violation of law, is not repugnant to the Federal Constitution as depriving directors of property without due process of law.

Winchester v. Howard, (1902) 136 Cal. 432.

22. Railroad Companies — a. REGULATING RATES — (1) In General. — The legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in

it authority over those matters, subject to the limitation that the carriage is not required without reward or upon conditions amounting to a taking of property for public use without just compensation.

Georgia R., etc., Co. v. Smith, (1888) 128 U. S. 179.

General statutes regulating the use of railroads in a state, or fixing the maximum rates of charges for transportation when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the state of its property without due process of law. *Railroad Commission Cases*, (1886) 116 U. S. 335, *reversing Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

The legislature has the power to fix maximum rates to be charged for services rendered in a public employment, and companies so engaged are subject to legislative control as to their rates unless protected by their charters. This amendment affords no protection, and for protection against abuses by legislatures the people must resort to the polls, not to the courts. *Munn v. Illinois*, (1876) 94 U. S. 134, *affirming* (1873) 69 Ill. 80. See also *Tilley v. Savannah, etc., R. Co.*, (1881) 5 Fed. Rep. 641.

A statute which fixes a maximum of charge to be made by a railroad company for fare and freight upon the transportation of persons and property does not deprive a railroad company of property without due process of law. Where property has been clothed with a public interest, the legislature may fix a limit to that which will in law be reasonable for its use. *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 178. See also *Winona, etc., R. Co. v. Blake*, (1876) 94 U. S. 180.

The Fact that a Railroad Has Been Organized under an Act of Congress for the accomplishment of national objects does not stand in the way of a state prescribing rates for transporting property on that road wholly between points within its territory, so long as Congress has not exercised that right under its reserved power.

Smyth v. Ames, (1898) 169 U. S. 522, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

(2) *Regulating Passenger Fares* — (a) *In General*. — A statute simply regulating passenger fares cannot be held, as a matter of law, to be unconstitutional. *Chicago, etc., R. Co. v. Wellman*, (1892) 143 U. S. 342.

(b) *Fixing Rate for Mileage Tickets*. — A statute requiring railroads to keep for sale one-thousand-mile tickets at certain rates, which rates are lower than the general rates, is a deprivation of property without due process of law, when the general rate has been fixed within the maximum rate established by the legislature at what must be presumed *prima facie* to be a reasonable rate. In so holding, the court is not thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix

If for the benefit of any part of the people, of the whole people, rates of transportation by railroad are changed and lowered so as to injure the vested rights of the carrier in his property, the provision of the Federal Constitution forbidding the states to deprive a person of his property without due process of law, presents an impassable barrier to such action. *Clyde v. Richmond, etc., R. Co.*, (1893) 57 Fed. Rep. 439.

Joint through rates. — An *Iowa* statute empowering a board of state railroad commissioners to establish joint through rates, does not deprive the railroad of property without due process of law. The power of the states is exercised through their designated officers, the railroad commissioners, by proceedings specially provided to enforce the authority of the state. The proceedings provided for notice to the railroad company, and that they shall be heard in the questions of joint rates. *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 337.

A proceeding in a court of visitation, upon which the legislature had conferred full power to regulate the operation of railroad and telegraph companies, and to prescribe schedules of rates and charges, and the power to pass judicially upon its regulations, and the reasonableness of the rates fixed by it, to embody its determination in decrees, which it was authorized to enforce by the appointment of receivers and the sequestration of the property of the companies, is not due process of law. *Western Union Tel. Co. v. Myatt*, (1899) 98 Fed. Rep. 360.

maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public.

Lake Shore, etc., R. Co. v. Smith, (1899) 173 U. S. 684, reversing Smith v. Lake Shore, etc., R. Co., (1897) 114 Mich. 460.

A statute requiring railroads to sell one-thousand-mile mileage books at a reduced price violates the Fourteenth Amendment of

the Federal Constitution as a taking of property without due process of law. Beardsley v. New York, etc., R. Co., (1900) 162 N. Y. 230, reversing (1897) 15 N. Y. App. Div. 251. See also Dillon v. Erie R. Co., (Supm. Ct. App. T. 1897) 19 Misc. (N. Y.) 118.

(3) *Must Be Reasonable* — (a) *In General*. — Legislation establishing a tariff of rates which is so unreasonable as practically to destroy the value of the property of the companies engaged in the carrying business deprives the companies of their property without due process of law.

St. Louis, etc., R. Co. v. Gill, (1895) 156 U. S. 657.

Not only is it the right of the public that the rates be just and reasonable, and the duty of the railroad commissioners to see that they are just and reasonable; there is a correlative right in the railroads that the rates imposed on them be just and reasonable, and if they be just and reasonable it is their right that they remain unchanged. Clyde v. Richmond, etc., R. Co., (1893) 57 Fed. Rep. 439.

State statutes which tend to enforce a compliance with the rates of a railroad commission, whether they be reasonable or not, and tending to embarrass or enabling the commissioners to embarrass such railroads as may choose to invoke the protection of the Constitution, are void. Mercantile Trust Co. v. Texas, etc., R. Co., (1892) 51 Fed. Rep. 529.

Rates fixed presumptively reasonable. — In examining rates fixed by the commission, they

must be taken presumptively as reasonable. Matthews v. Corporation Com'rs, (1901) 106 Fed. Rep. 10.

When a railroad is composed by consolidation of two or more companies incorporated in two or more states, the reasonableness of the rates established by statute in one state is not to be determined by the cost of transportation over one of the divisions of the consolidated road within that state, but the correct test is as to the effect on the entire line. The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a rate at which some such part would be unremunerative, but the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the statute within the limits of that state. St. Louis, etc., R. Co. v. Gill, (1895) 156 U. S. 657.

(b) *Question of Reasonableness Is Judicial.* — The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is mainly a question for judicial investigation requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law.

Chicago, etc., R. Co. v. Minnesota, (1890) 134 U. S. 458.

"If unhampered by contract there is no doubt of the power of the state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public; and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of property of the company without due process of law." Lake Shore, etc.,

R. Co. v. Smith, (1899) 173 U. S. 687, reversing Smith v. Lake Shore, etc., R. Co., (1897) 114 Mich. 460. See also Beardsley v. New York, etc., R. Co., (1900) 162 N. Y. 230, reversing (1897) 15 N. Y. App. Div. 251.

The enforcement of the constitutional right of railroad companies to resist the enforcement of such regulations of rates as result in depriving them of their property rights, belongs to the courts. They can always institute the inquiry whether the rates imposed by a commission are just and reasonable, and on the determination of this question depends their right to interfere. Clyde v. Richmond, etc., R. Co., (1893) 57 Fed. Rep. 439.

While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. *Smyth v. Ames*, (1898) 169 U. S. 526, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

Formation of tariff is legislative or administrative.—The formation of a tariff of charges for the transportation by a common

carrier of persons or property is a legislative or administrative rather than a judicial function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. *Trammell v. Dinsmore*, (C. C. A. 1900) 102 Fed. Rep. 800.

A Statute Which Gives to a Railroad Commission power, on finding a railroad company guilty of charging extortionate rates, to fix rates of toll or compensation, and which declares that any railroad, its officers, agents, or employees, charging, collecting, or receiving higher rates than those fixed, shall be guilty of extortion, deprives such persons of liberty, without due process of law, when there is no provision in the Act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just.

Louisville, etc., R. Co. v. McChord, (1900) 103 Fed. Rep. 216, in which case the court said that a legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense, and lower its rates, alone, as the penalty of such conviction. "Nothing short of a judicial proceeding conforming to due process of law, which not only includes

due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted." *Reversed* on jurisdictional grounds, (1901) 183 U. S. 483.

(4) **Must Admit of Earning Just Compensation.**—A state enactment, or regulations under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

Smyth v. Ames, (1898) 169 U. S. 526, wherein the court said: "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Affirming Ames v. Union Pac. R. Co., (1894) 64 Fed. Rep. 165. See also *Wallace v. Arkansas Cent. R. Co.*, (C. C. A. 1902) 118 Fed. Rep. 424; *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 9.

On present value of property.—As a basis for the calculation of reasonable rates in estimating the value of the property, the estimate must be based on its present value and not what was its value in the past, nor what it cost, nor what it would cost to duplicate it, nor its probable future value. *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 9.

It is doubtful whether any single rule can be laid down by which the reasonableness of rates can be determined, applicable to all

cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which would have to pay. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable if, under them, there is earned by the railroad company a fair interest on the actual value of the property. It is not easy always to determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 177.

Reorganized railroad.—A state statute fixed the maximum fare that a railroad might charge and collect for carrying a passenger within the state at three cents per mile. It was held that, as to a reorganized railroad, the rate was not unreasonable by reason of the admitted fact that with the same traffic that their road had at the time, and charging for transportation at the rate of three cents per mile, the net yearly income would be less than one and a half per cent. of the original cost of the road and only a little more than two per cent. on the amount of its bonded debt, when there was no evidence as to how much money the bonds cost or as to the amount of the capital stock of the corporation as organized, or as to the sum paid for the road by the corporation or its trustees. *Dow v. Beidelman*, (1888) 125 U. S. 690.

Compensation implies three things—payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping of the roadbed and the cars and machinery and other appliances in perfect order and repair. *Chicago, etc., R. Co. v. Dey*, (1888) 35 Fed. Rep. 879.

A general averment in a bill that a tariff as established is unjust and unreasonable is supported by the admitted facts that the road cost far more than the amount of stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road;

that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent.; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable. *Reagan v. Farmers' L. & T. Co.*, (1894) 154 U. S. 412.

A schedule as a whole must control, and its validity or invalidity does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation. *Chicago, etc., R. Co. v. Dey*, (1888) 35 Fed. Rep. 881.

Entire schedule must be considered.—In deciding whether the rates fixed under legislative authority violate this amendment, the determination cannot rest on one set of rates for specified articles, but consideration should be given to all the rates on all articles, and it should be ascertained whether, as a whole, the result is reasonable. *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 10.

Local rates not alone to be considered.—In determining whether the maximum rates for local traffic prescribed by a state statute are reasonable, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still leaves enough to pay reasonable compensation to the owners of the property, uphold the Act, because, if the legislature of one state can put in force this tariff for local business, the legislatures of other states through which these roads run, and the Congress of the United States may make corresponding reductions in the rates of all other business, local and interstate, and the aggregate of such reductions might entirely destroy all earning capacity from the property. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 179.

Comparison of gross receipts from new and old schedules.—A court cannot proceed upon the theory that a comparison of the actual gross receipts of a railroad company from its local business with those it would have received if the rates prescribed had been in force is sufficient to determine the question of the reasonableness of the latter rates, and institute such comparison with respect to the four years preceding the commencement of the suit. The amount of gross receipts from any business does not of itself determine whether such business is profitable or not. The question of expense incurred in producing those receipts must be always taken into account, and only by striking the balance be-

tween the two can it be determined that the business is profitable. *Chicago, etc., R. Co. v. Tompkins*, (1900) 176 U. S. 167, *reversing* (1898) 90 Fed. Rep. 363.

Profits on good and bad years.—A railroad is not entitled to a given per cent. on its capital stock without reference to the interests of the public. The net profits of good years cannot be appropriated to make good the losses of the bad years, as in the case of years of panic and general depression when all investments of every character suffer. *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 9.

Result in carrying freight at a loss.—A statute which prescribes the maximum of rates for the transportation of freight by railroads within the state, under which present reasonable remuneration is not furnished, cannot be enforced. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 167.

Rates giving some compensation, however small.—Where the proposed rates will give some compensation, however small, to the owners of the railroad property, the courts have no power to interfere. Appeal must then be made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates. While by reducing rates, the value of the stockholder's property may be reduced, in that less dividends are possible, yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward. *Chicago, etc., R. Co. v. Dey*, (1888) 35 Fed. Rep. 880.

(5) *Reference to Value of Services.*—Rates for the transportation of persons or property on a railroad should be exacted with reference to the fair value of the services rendered, and not simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may reasonably be charged.

Smyth v. Ames, (1898) 169 U. S. 544, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

Not value of service to person to whom rendered.—The measure of what are just and reasonable rates is not the value of the

insufficient to pay half interest on valid debt.—When the earnings of a railroad, conducted efficiently, economically, and honestly, with operating expenses in no case greater than such efficient, economical, and honest management requires, are insufficient to pay one-half the interest on a valid debt, contracted, as found by the master in this case, in a careful, economical, and honest administration of the company's business, then a schedule of proposed rates which materially reduced these earnings would be unjust and unreasonable. *Chicago, etc., R. Co. v. Smith*, (1901) 110 Fed. Rep. 475.

Two per cent. on preferred, nothing on common stock.—While the legislature has a right to regulate and, within proper bounds, to limit the rates and tolls that may be charged by a railroad company, it does not appear to have the right thereby to destroy or take away such reasonable profits as may be earned by a company for the benefit of its stockholders. The enforcement of legislation prescribing rates, and requiring a railroad company to issue mileage books at such a rate per mile as would result in the payment of two per cent. dividends on the preferred stock, without any dividend reaching to the common stock, would seem to be far within a reasonable return on the investment of the stockholders and far below what the legislature could regulate away. *Ball v. Rutland R. Co.*, (1899) 93 Fed. Rep. 516.

Return of 3.3 to 4.5 on investment.—A municipal ordinance, regulating the rate of fare upon the street railways, deprives the company of property without due process of law when it appears that the previous rate was not excessive, and that the new rate would result in a return upon the investment of from 3.3 per cent. to 4.5, upon the computations of the valuations and earnings. *Milwaukee Electric R., etc., Co. v. Milwaukee*, (1898) 87 Fed. Rep. 579.

service to the person to whom it is rendered. The true measure is the proper return to the individual or corporation rendering the service. The value of a service rendered to a consignee by a carrier depends upon fluctuating circumstances, the condition of the market for goods and for money, the pres-

ent demand for the goods by the public, and his own present supply. The value of the service to the consignee must constantly vary, and can never be easily reached, and as between several consignees at the same point of delivery must also greatly vary. No commission could fix a rate on this basis. On the other hand, the remuneration to the carrier — the remuneration which he should reasonably expect — depends on certain fixed and almost unchangeable facts, the reasonable re-

turn for the investment, due regard being had to the public interest. *Clyde v. Richmond, etc., R. Co.*, (1893) 57 Fed. Rep. 440.

Rate fixed lower than cost of service. — A rate fixed by a railroad commission for switching cars, which does not pay the actual cost of service, that is, wages of employees, rent of engines, keeping the track in repair, cannot be put in force. *Chicago, etc., R. Co. v. Becker*, (1888) 35 Fed. Rep. 883.

(6) *Comparison with Schedules in Force Elsewhere.* — The fact that a schedule of rates fixed by a state railroad commission is higher or lower than other schedules in force elsewhere, or at other times in the same state, does not necessarily determine its validity.

Chicago, etc., R. Co. v. Dey, (1888) 35 Fed. Rep. 881.

Rates higher than in adjoining states. — The fact that the rates prescribed by statute are higher than those in adjoining states is not conclusive as to their reasonableness. The volume of business in one state may be greater per mile, while the cost of construction and

of maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states are of little value, unless all of the elements that enter into the problem are presented. *Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 188.

(7) *Prohibiting Higher Rates for Short Hauls.* — A state, by enacting a rule of action for railroad companies, forbidding a greater rate of charges for a shorter than for a longer distance, does not deprive a railroad of its property without due process of law.

Louisville, etc., R. Co. v. Kentucky, (1902) 183 U. S. 512, *affirming* (1899) 106 Ky. 633.

A Nebraska statute which requires railroad companies, as an absolute finality, and without the right of judicial investigation, to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between

the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, is in conflict with the provisions of the Fourteenth Amendment of the Constitution of the United States, that no state shall "deprive any person of life, liberty, or property without due process of law." *State v. Sioux City, etc., R. Co.*, (1896) 46 Neb. 682.

b. PROHIBITING BUSINESS OF TICKET SCALPING. — A statute entitled "An Act to prevent frauds upon travelers, and owner or owners of any railroad, steamboat, or other conveyance for the transportation of passengers," does not deprive the purchaser of a ticket of his property therein, when it authorizes the original purchaser of a ticket from an authorized agent to resell the whole or any unused part of such ticket, to the owner of the railroad or steamboat who sold it to him, or to sell any part of it to any other person, if the original purchase of it from the agent was with the *bona fide* intention of traveling upon it.

Burdick v. People, (1894) 149 Ill. 602.

A Minnesota statute entitled "An Act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," is valid. *State v. Corbett*, (1894) 57 Minn. 348.

The New York statute prohibiting the selling of railroad and steamboat tickets by any person except authorized agents was held to be legislation hostile to the liberty of the citizen. *People v. City Prison*, (1898) 157

N. Y. 116, *reversing* (1898) 26 N. Y. App. Div. 228. But in *Jannin v. State*, (1901) 42 Tex. Crim. 640, the court, in commenting on this New York case, said: "This case was taken to the Court of Appeals of said state, and there, by a divided court of four to three, the law was held to be unconstitutional. In that case the learned chief justice appears to consider that the passage ticket of a railway company is property, and any law which attempts to restrain or inhibit the disposition and sale of same is *pro tanto* a violation of the Constitution, which provides that no per-

son shall be deprived of life, liberty, or property without due process of law. Again, that opinion holds that the attempt of the legislature to confine the sale of railroad passage tickets to the agents named in the Act was the creation of a monopoly, and that the legislation in question inhibited by said provisions of the constitution of New York did not come within the police power of the legislature. A number of cases are cited in favor of the opinion. It will be observed, however, that there is a marked distinction between the New York law and our statute on this subject, in that the New York statute, by the construction placed on it by Judge Parker, authorized not only the agents of the particular corporation to make sales of such tickets, but the agents of all other transportation companies; and in the opinion the learned judge lays stress on this construction

of the statute, as class legislation and creating a monopoly. As stated before, the opinion of the New York Court of Appeals on this subject runs counter to all of the authorities that have come under our observation."

A Pennsylvania statute prohibiting the sale of railroad tickets except by the duly authorized agents of carriers, and making the sale, barter, or transfer of tickets by others a misdemeanor, is valid. *Com. v. Keary*, (1900) 14 Pa. Super. Ct. 583, *affirmed* (1901) 198 Pa. St. 500; *Com. v. Wilson*, (1880) 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484.

The Texas statute declaring it to be a crime for any person not authorized by the railway company, to sell for a consideration a ticket, was held to be valid. *Jannin v. State*, (1901) 42 Tex. Crim. 631.

C. LIABILITY FOR INJURIES TO PASSENGERS. — A statute providing that "every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers* while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice," does not deprive a railroad company of property without due process of law. Statutes imposing an additional, or even absolute, liability on railroads for injuries to passengers or property are not repugnant to the Constitution of the United States.

Clark v. Russell, (C. C. A. 1899) 97 Fed. Rep. 900. See also *Chicago, etc., R. Co. v. Zerneck*, (1900) 59 Neb. 689; *Chicago, etc., R. Co. v. Hambel*, (Neb. 1902) 89 N. W. Rep. 643.

d. LIABILITY FOR INJURY TO STOCK. — A statute which provides that if a railroad company fails to fence its lines against live stock running at large, it shall be liable to the owner of any such stock injured or killed by reason of the want of such fence, for the value of the property or damage caused, and that if the corporation neglects to pay the value or damage done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officers of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto, does not deprive the railway company of property without due process of law.

Minneapolis, etc., R. Co. v. Beckwith, (1889) 129 U. S. 27.

A Colorado statute making railroad companies unconditionally liable for stock and cattle killed by its trains, according to a fixed schedule of values, and without making any provision for the ascertainment of such values by evidence or by any mode of actual trial, is unconstitutional as taking property without due process of law. *Wadsworth v. Union Pac. R. Co.*, (1893) 18 Colo. 600.

Statutes fixing upon railroad companies an absolute liability for stock injured or killed,

and providing for a recovery of double the appraised value of the animals injured or killed, with a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed, are unconstitutional and void as a denial of due process of law. *Denver, etc., R. Co. v. Outcalt*, (1892) 2 Colo. App. 395, *followed* *Denver, etc., R. Co. v. Davidson*, (1892) 2 Colo. App. 443; *Rio Grande Western R. Co. v. Whitson*, (1894) 4 Colo. App. 426; *Rio Grande Western R. Co. v. Chamberlin*, (1893) 4 Colo. App. 149; *Rio Grande Western R. Co. v. Vaughn*, (1893) 3 Colo. App. 465.

A Missouri statute requiring railroad corporations to erect fences where their roads pass through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle, and other animals from going on the roads, and making them liable in double the amount of all damages which shall be done to horses, cattle, mules, or other animals occasioned by the failure to construct or maintain such fences or cattle guards, does not deprive such railroads of property without

due process of law so far as it allows a recovery of damages for stock killed or injured in excess of its value. *Missouri Pac. R. Co. v. Humes*, (1885) 116 U. S. 523.

An Oregon statute which makes a railroad company liable for the value of stock killed upon or near any unfenced track by a train in motion, and also providing that in actions for the value of stock killed, proof of killing shall be conclusive evidence of negligent misconduct, was held to be constitutional. *Sullivan v. Oregon R., etc., Co.*, (1890) 19 Oregon 319.

e. LIABILITY FOR COMMUNICATED FIRES. — A statute by which every railroad corporation owning and operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines, and is declared to have an insurable interest in property along its route, and authorized to insure such property for its protection against such damages, does not deprive the railroad company of its property without due process of law. The statute is not a penal one, imposing punishment for a violation of law; but is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered.

St. Louis, etc., R. Co. v. Mathews, (1897) 165 U. S. 5, *affirming* (1894) 121 Mo. 298.

A South Carolina statute providing that "every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right (of way) of such corporation unlawfully or without its consent; and it shall have an insurable interest in the property upon its

route for which it may so be held responsible, and may procure insurance thereon in its own behalf," does not deprive a railroad company of property without due process of law. *McCandless v. Richmond, etc., R. Co.*, (1892) 38 S. Car. 105. See also *Mobile Ins. Co. v. Columbia, etc., R. Co.*, (1893) 41 S. Car. 408; *Lipfeld v. Charlotte, etc., R. Co.*, (1893) 41 S. Car. 285. This statute, construed so as to make a railroad company liable for damages by fire originating from the heating of a depot, is not in violation of the Federal Constitution as a taking of property without due process of law. *Brown v. Carolina Midland R. Co.*, (1903) 67 S. Car. 481.

Imposing a Penalty, in Addition to Ordinary Damages, upon a railroad company for failing to keep its right of way clear of dry vegetation so as to prevent fires, is not in violation of the Fourteenth Amendment of the Constitution of the United States as a taking of property without due process of law.

McFarland v. Mississippi River, etc., R. Co., (1903) 175 Mo. 422.

Conclusive Presumption of Negligence. — A statute entitled "An Act to regulate prairie fires," providing that "any railroad company operating any line in this territory shall be liable for all damages sustained by fire originating from operating their road," does not deprive a railroad company of its property without due process of law in providing a liability for injuries sustained as stated in the Act, although no negligence is shown on the part of the railroad company.

Choctaw, etc., R. Co. v. Alexander, (1897) 7 Okla. 579.

f. LIABILITY OF CONNECTING CARRIER FOR DAMAGES TO GOODS. — A statutory provision making a railroad liable for damages to goods transported by it which were received from a connecting line, though the injury to the goods may have occurred before they reached its line, does not deprive the railroad company of property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

Texas, etc., *R. Co. v. Randle*, (1898) 18 Tex. Civ. App. 348.

g. MODIFYING FELLOW-SERVANT LAW. — A state statute which so far modifies and changes the common law that a servant or employee of a railroad company may maintain an action against such railroad company for an injury received while in the line of his employment, through the negligence of a fellow servant or employee engaged in the same common work of the master or employer, does not authorize the taking of property without due process of law when the liability imposed arises only for injuries subsequently committed.

Missouri Pac. R. Co. v. Mackey, (1888) 127 U. S. 207. See also *Minneapolis, etc., R. Co. v. Herrick*, (1888) 127 U. S. 210; *Powell v. Sherwood*, (1901) 162 Mo. 605.

railroads as such, but to railroad hazards, and governs all persons and corporations operating a line of railroad incident to which are the hazards and risks intended to be guarded against, does not violate the Constitution of the United States. *Kibbe v. Stevenson Iron Min. Co.*, (C. C. A. 1905) 136 Fed. Rep. 149.

A Minnesota fellow-servant law which, as construed by the state court, applies not to

h. REQUIRING SEPARATE COACHES FOR WHITES AND NEGROES. — A statute requiring railroad companies to provide separate coaches for whites and negroes and to designate for which race each car is intended does not violate the Fourteenth Amendment.

Chesapeake, etc., R. Co. v. Com., (Ky. 1899) 51 S. W. Rep. 160.

i. PROHIBITING DISCRIMINATION ON ACCOUNT OF RACE. — A prohibition of discrimination against passengers on account of race or color by persons engaged in the business of common carriers does not deprive such carriers of property without due process of law, but to prohibit the separation of passengers on account of race would be unconstitutional.

Decuir v. Benson, (1875) 27 La. Ann. 1.

j. ESTABLISHING DEPOTS AT INCORPORATED VILLAGES. — A state statute providing, as construed by the state courts, that incorporated villages within the state located on railway lines are *prima facie* entitled to depots, and that at a hearing before the railroad commissioners and the courts, the railroad has the burden of showing that the establishment of a depot is unreasonable and unnecessary, does not deny to a railroad company the right to reasonably manage or control its property, or arbitrarily take its property without its consent or without compensation or due process of law.

Minneapolis, etc., R. Co. v. Minnesota, (1904) 193 U. S. 63.

k. REQUIRING RAILROADS TO BUILD DEPOTS AT CROSSINGS. — A statute requiring railroads "at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or hereafter may be, made upon the same grade, and the character of the land at such

State v. Preferred Tontine Mercantile Co., (1904) 184 Mo. 160, in which case the court said: "No right is taken away from the defendant, except as the result of a judgment of a court of competent jurisdiction after notice and hearing. The fact that the receiver and his attorney are paid out of the assets

administered upon does not constitute the taking of the defendants' property without due process of law. Such allowances have ever been made in cases of receivership, and are properly made, for otherwise the court would be helpless to enforce its decrees."

e. ENFORCEMENT OF STOCKHOLDER'S LIABILITY. — Under the provisions of a statute entitled "An Act to provide for the better enforcement of the liability of stockholders of corporations," the District Court is authorized to proceed, upon notice given as such court may direct, to ascertain the probable indebtedness of a corporation which has made an assignment under the laws of the state for the benefit of its creditors, or for which a receiver in insolvency has been appointed, and the expenses of such assignment or receivership, and the probable amount of assets available for the payment thereof, and also as to what parties are or may be liable as stockholders, and the nature and extent of such liability; and if, on such ascertainment, it appears to the court that the assets are insufficient to meet the indebtedness and expenses of the trust, it is authorized and directed to levy a ratable assessment upon all parties liable as stockholders, or on account of stock shares, for such an amount, proportion, or percentage of the liability as in its discretion such court may deem proper; and the order and assessment so levied is made conclusive upon and against all parties so liable as to all matters relating to the amount of, the propriety of, and the necessity for, such an assessment. It was held that these provisions are not in violation of any provision of the Constitution of the United States in that a judicial proceeding is thereby authorized without due process of law.

Straw, etc., Mfg. Co. v. L. D. Kilbourne Boot, etc., Co., (1900) 80 Minn. 125.

f. EXECUTION AGAINST MEMBERS OF LIMITED PARTNERSHIP ASSOCIATION. — The issuance, in accordance with statute, of an execution against the members of a limited partnership association to the extent of their unpaid subscriptions to the stock, upon the return of an unsatisfied execution issued against the association, does not deny to such members due process of law.

Rouse v. Donovan, (1895) 104 Mich. 234.

g. MAKING DIRECTORS SURETIES FOR CODIRECTORS AND OFFICERS. — A provision of a state constitution making corporate directors sureties for their codirectors and for the officers of the corporation, for moneys so misappropriated as to render the defaulting officer guilty of a violation of law, is not repugnant to the Federal Constitution as depriving directors of property without due process of law.

Winchester v. Howard, (1902) 136 Cal. 432.

22. Railroad Companies — *a. REGULATING RATES* — (1) *In General.* — The legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in

it authority over those matters, subject to the limitation that the carriage is not required without reward or upon conditions amounting to a taking of property for public use without just compensation.

Georgia R., etc., Co. v. Smith, (1888) 128 U. S. 179.

General statutes regulating the use of railroads in a state, or fixing the maximum rates of charges for transportation when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the state of its property without due process of law. *Railroad Commission Cases*, (1886) 116 U. S. 335, *reversing Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

The legislature has the power to fix maximum rates to be charged for services rendered in a public employment, and companies so engaged are subject to legislative control as to their rates unless protected by their charters. This amendment affords no protection, and for protection against abuses by legislatures the people must resort to the polls, not to the courts. *Munn v. Illinois*, (1876) 94 U. S. 134, *affirming* (1873) 69 Ill. 80. See also *Tilley v. Savannah, etc., R. Co.*, (1881) 5 Fed. Rep. 641.

A statute which fixes a maximum of charge to be made by a railroad company for fare and freight upon the transportation of persons and property does not deprive a railroad company of property without due process of law. Where property has been clothed with a public interest, the legislature may fix a limit to that which will in law be reasonable for its use. *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 178. See also *Winona, etc., R. Co. v. Blake*, (1876) 94 U. S. 180.

If for the benefit of any part of the people, of the whole people, rates of transportation by railroad are changed and lowered so as to injure the vested rights of the carrier in his property, the provision of the Federal Constitution forbidding the states to deprive a person of his property without due process of law, presents an impassable barrier to such action. *Clyde v. Richmond, etc., R. Co.*, (1893) 57 Fed. Rep. 439.

Joint through rates.—An *Iowa* statute empowering a board of state railroad commissioners to establish joint through rates, does not deprive the railroad of property without due process of law. The power of the states is exercised through their designated officers, the railroad commissioners, by proceedings specially provided to enforce the authority of the state. The proceedings provided for notice to the railroad company, and that they shall be heard in the questions of joint rates. *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 337.

A proceeding in a court of visitation, upon which the legislature had conferred full power to regulate the operation of railroad and telegraph companies, and to prescribe schedules of rates and charges, and the power to pass judicially upon its regulations, and the reasonableness of the rates fixed by it, to embody its determination in decrees, which it was authorized to enforce by the appointment of receivers and the sequestration of the property of the companies, is not due process of law. *Western Union Tel. Co. v. Myatt*, (1899) 98 Fed. Rep. 360.

The Fact that a Railroad Has Been Organized under an Act of Congress for the accomplishment of national objects does not stand in the way of a state prescribing rates for transporting property on that road wholly between points within its territory, so long as Congress has not exercised that right under its reserved power.

Smyth v. Ames, (1898) 169 U. S. 522, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

(2) **Regulating Passenger Fares**—(a) **In General.**—A statute simply regulating passenger fares cannot be held, as a matter of law, to be unconstitutional. *Chicago, etc., R. Co. v. Wellman*, (1892) 143 U. S. 342.

(b) **Fixing Rate for Mileage Tickets.**—A statute requiring railroads to keep for sale one-thousand-mile tickets at certain rates, which rates are lower than the general rates, is a deprivation of property without due process of law, when the general rate has been fixed within the maximum rate established by the legislature at what must be presumed *prima facie* to be a reasonable rate. In so holding, the court is not thereby interfering with the power of the legislature over railroads as corporations or common carriers, to so legislate as to fix

maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience, or proper protection of the public.

Lake Shore, etc., R. Co. v. Smith, (1899) 173 U. S. 684, reversing Smith v. Lake Shore, etc., R. Co., (1897) 114 Mich. 460.

A statute requiring railroads to sell one-thousand-mile mileage books at a reduced price violates the Fourteenth Amendment of

the Federal Constitution as a taking of property without due process of law. Beardsley v. New York, etc., R. Co., (1900) 162 N. Y. 230, reversing (1897) 15 N. Y. App. Div. 251. See also Dillon v. Erie R. Co., (Supm. Ct. App. T. 1897) 19 Misc. (N. Y.) 118.

(3) *Must Be Reasonable* — (a) *In General.* — Legislation establishing a tariff of rates which is so unreasonable as practically to destroy the value of the property of the companies engaged in the carrying business deprives the companies of their property without due process of law.

St. Louis, etc., R. Co. v. Gill, (1895) 156 U. S. 657.

Not only is it the right of the public that the rates be just and reasonable, and the duty of the railroad commissioners to see that they are just and reasonable; there is a correlative right in the railroads that the rates imposed on them be just and reasonable, and if they be just and reasonable it is their right that they remain unchanged. Clyde v. Richmond, etc., R. Co., (1893) 57 Fed. Rep. 439.

State statutes which tend to enforce a compliance with the rates of a railroad commission, whether they be reasonable or not, and tending to embarrass or enabling the commissioners to embarrass such railroads as may choose to invoke the protection of the Constitution, are void. Mercantile Trust Co. v. Texas, etc., R. Co., (1892) 51 Fed. Rep. 529.

Rates fixed presumptively reasonable. — In examining rates fixed by the commission, they

must be taken presumptively as reasonable. Matthews v. Corporation Com'rs, (1901) 106 Fed. Rep. 10.

When a railroad is composed by consolidation of two or more companies incorporated in two or more states, the reasonableness of the rates established by statute in one state is not to be determined by the cost of transportation over one of the divisions of the consolidated road within that state, but the correct test is as to the effect on the entire line. The company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a rate at which some such part would be unremunerative, but the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the statute within the limits of that state. St. Louis, etc., R. Co. v. Gill, (1895) 156 U. S. 657.

(b) *Question of Reasonableness Is Judicial.* — The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is mainly a question for judicial investigation requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law.

Chicago, etc., R. Co. v. Minnesota, (1890) 134 U. S. 458.

"If unhampered by contract there is no doubt of the power of the state to provide by legislation for maximum rates of charges for railroad companies, subject to the condition that they must be such as will admit of the carrier earning a compensation that under all the circumstances shall be just to it and to the public; and whether they are or not is a judicial question. If the rates are fixed at an insufficient amount within the meaning of that term as given by the courts, the law would be invalid, as amounting to the taking of property of the company without due process of law." Lake Shore, etc.,

R. Co. v. Smith, (1899) 173 U. S. 687, reversing Smith v. Lake Shore, etc., R. Co., (1897) 114 Mich. 460. See also Beardsley v. New York, etc., R. Co., (1900) 162 N. Y. 230, reversing (1897) 15 N. Y. App. Div. 251.

The enforcement of the constitutional right of railroad companies to resist the enforcement of such regulations of rates as result in depriving them of their property rights, belongs to the courts. They can always institute the inquiry whether the rates imposed by a commission are just and reasonable, and on the determination of this question depends their right to interfere. Clyde v. Richmond, etc., R. Co., (1893) 57 Fed. Rep. 439.

While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. *Smyth v. Ames*, (1898) 169 U. S. 526, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

Formation of tariff is legislative or administrative.—The formation of a tariff of charges for the transportation by a common

carrier of persons or property is a legislative or administrative rather than a judicial function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all the circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. *Trammell v. Dinsmore*, (C. C. A. 1900) 102 Fed. Rep. '800.

A Statute Which Gives to a Railroad Commission power, on finding a railroad company guilty of charging extortionate rates, to fix rates of toll or compensation, and which declares that any railroad, its officers, agents, or employees, charging, collecting, or receiving higher rates than those fixed, shall be guilty of extortion, deprives such persons of liberty, without due process of law, when there is no provision in the Act that the judicial tribunal which shall try the accused for that offense may investigate and decide whether the rate fixed in this extraordinary preliminary proceeding before the administrative body was reasonable or just.

Louisville, etc., R. Co. v. McChord, (1900) 103 Fed. Rep. 216, in which case the court said that a legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense, and lower its rates, alone, as the penalty of such conviction. "Nothing short of a judicial proceeding conforming to due process of law, which not only includes

due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion, as a basis for imposing the arbitrary penalty of lowering their customary rates, and as furnishing a stepping stone to ulterior penalties of great severity, which it is the obvious purpose of the Act to have inflicted." *Reversed* on jurisdictional grounds, (1901) 183 U. S. 483.

(4) Must Admit of Earning Just Compensation.—A state enactment, or regulations under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

Smyth v. Ames, (1898) 169 U. S. 526, wherein the court said: "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Affirming Ames v. Union Pac. R. Co., (1894) 64 Fed. Rep. 165. See also *Wallace v. Arkansas Cent. R. Co.*, (C. C. A. 1902) 118 Fed. Rep. 424; *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 9.

On present value of property.—As a basis for the calculation of reasonable rates in estimating the value of the property, the estimate must be based on its present value and not what was its value in the past, nor what it cost, nor what it would cost to duplicate it, nor its probable future value. *Matthews v. Corporation Com'rs*, (1901) 106 Fed. Rep. 9.

It is doubtful whether any single rule can be laid down by which the reasonableness of rates can be determined, applicable to all

Rates Fixed at an Amount that Does Not Allow a Reasonable Return for the investment do not deprive a water company of property without due process of law, when the plant was built for a large area and has not as yet the customers contemplated.

San Diego Land, etc., Co. v. Jasper (1903) 189 U. S. 439, wherein the court said that in ascertaining what are just water rates that may be fixed by municipal ordinances, the real value of the property and the fair value on themselves of the services rendered should be taken into consideration. See also *San Diego Land, etc., Co. v. Jasper*, (1898) 89 Fed. Rep. 281; *Boise City Irrigation, etc., Co. v. Clark*, (C. C. A. 1904) 131 Fed. Rep. 415.

"What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public. The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property. So that it cannot be said that the amount of such bonds should in every case control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public." *San Diego Land, etc., Co. v. National City*, 174 U. S. 739, *affirming* (1896) 74 Fed. Rep. 79.

Judicial investigation into effect of ordinance.—Whether an ordinance fixing water rates deprives a water company of its property without due process of law, is a question to be determined by the court upon an original independent investigation, and not by an examination of proceedings of the board to

ascertain what evidence it received and acted upon, and whether that evidence was sufficient to justify the conclusion reached. "This does not mean that the same evidence submitted to the board may not be submitted to the court, as appears to have been done in this case; and, if the evidence is competent and relevant to the issues before the court, it will be considered. But it does not follow that, because the board may have received evidence that the court would have rejected, or has rejected evidence the court would have received, the proceedings of the board are to be regarded as illegal, and the ordinance as depriving complainant of constitutional rights. So with respect to the proceedings of the board in determining the value of complainant's property in actual use, and the necessary expense that will be incurred in keeping it in operation, elements may have been considered by the board that should have been omitted, and elements omitted that should have been considered, and still the ordinance be, in effect, just and constitutional." *Spring Valley Waterworks v. San Francisco*, (1903) 124 Fed. Rep. 584.

It devolves upon a party complaining to show that the rates established by the ordinance complained of will not yield a fair interest on the value of that portion of its property, making due allowance for the cost of its maintenance, and the depreciation of the plant by reason of its wear and tear, and having due regard also to the rights of consumers. *San Diego Land, etc., Co. v. Jasper*, (1898) 89 Fed. Rep. 281.

Method of Estimating Value of Property.—For the purposes of passing upon a motion for a preliminary injunction to restrain a municipal corporation from enforcing an ordinance fixing water rates which were alleged to be unreasonable, and in effect to deprive the water company of its property without due process of law, the court estimated the value of the company's property by summarizing the present value of the capital stock, the bonded indebtedness, and the floating indebtedness.

Spring Valley Waterworks v. San Francisco, (1903) 124 Fed. Rep. 598, wherein the court said: "The Supreme Court of the United States has ruled (1) that individuals and corporations engaged in performing a public service are entitled to have just com-

ensation for the use of their property employed in such service, and (2) that the determination of the legislature is to be presumed to be just and must be upheld, unless it clearly appears to result in enforcing unreasonable and unjust rates."

Six Per Cent. on Present Value of Property.—It is not confiscation nor a taking of property without due process of law to fix water rates so as to give an income of six per cent. upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent. a month income upon the capital actually invested in the undertaking.

If not hampered by an unalterable contract, providing that a certain compensation should always be received, a law which reduces the compensation theretofore allowed to six per cent. upon the present value of the property used for the public is not unconstitutional.

Stanislaus County v. San Joaquin, etc., Canal, etc., Co., (1904) 192 U. S. 213.

26. Gas Companies—*a. REGULATING RATES.*—When a gas company has been chartered with power and authority to manufacture and sell gas within the limits of a municipal corporation, and has received permission from the city, and the company has laid down its pipes, it has a fixed and vested right to manufacture and sell gas within the city limits. By the terms of the charter there is necessarily implied the right of the company to charge a reasonable rate for all gas furnished, just as though it had been expressed in positive terms in the charter itself. A municipal ordinance fixing the rate of charge at a price greatly less than the cost of manufacturing and delivering the gas is a taking of the company's property without due process of law. The limitation upon the power of regulation is that in the reduction of prices, or in the reduction of the compensation for services, the municipal corporation cannot go below the limits of reasonable compensation.

Cleveland Gaslight, etc., Co. v. Cleveland, (1891) 71 Fed. Rep. 610, wherein the court said: "Now, what is the adjudication of the United States on this subject? I will notice it but a moment. The question came up in *Munn v. Illinois*, (1876) 94 U. S. 113, in reference to the elevator company. The question there presented was this: Is a company or individual who dedicates or appropriates his property to public use, subject to legislative authority and control on the subject of the compensation he shall charge for the use of his property? That was the sole question. The Supreme Court of the United States, speaking through its then distinguished justice, said yes. That case involved merely the power. Nothing more. There was not a word about the question as to the limitation upon that power. There was not anything in the case that called upon the court to define the limitation of the power, or decide to what extent it might or might not go. But they did say in that case that when an individual or company dedicates its property to a public use, applies it to public use, invites public use, the police power of the state extended over the company to the extent of fixing rates. That was the only question presented, and the only question that the court was then called upon to consider. Subsequently, there came before the Supreme Court of the United States from Mississippi the question as to the power of the railroad commissioners of that state to fix the rates of the railroad companies running through the state for the carriage of passengers and freight. In that case some of the companies, in their charters, were allowed to charge reasonable rates; some of them were allowed to charge not exceeding four or five cents per mile; some of them had provisions that their directors might fix rates; and so on. The court said, in that

case, simply that the power did exist, notwithstanding those provisions of the charters. Notwithstanding those provisions in the separate charters of the different companies, the court held that the state of Mississippi did have the right to delegate to railroad commissioners the authority to regulate rates. But it distinctly stated, through its chief justice, in that case: 'How far this regulation may go we do not now say. How far they may go in the direction of destruction we do not say. It is a dangerous line to define. It may be as indefinable as the lines between the colors of the rainbow.' So they properly said: 'We will wait until the precise question comes before us; but we throw out the intimation now that we do not mean to pass upon that question of the limitation of the power.' Then came the *Minnesota* case, against the *Chicago, etc., R. Co. v. Minnesota*, (1890) 134 U. S. 418, 461. In that case the Supreme Court was brought face to face with the question, may the power of regulation, which we concede in the states, go to the point of taking the services of these public carriers and fixing a rate which will be less than what is reasonable, just, and right, and less than will yield them a fair compensation for their services. They met the question, and they met it by saying that the question of a reasonable rate was a judicial question; that the question of a reasonable compensation was a judicial one; that it was not in the power of the state, directly, through its legislature, or through the delegated authority of a commission, to fix arbitrarily the compensation, or estop and shut the mouth, of the party who was to render the services and earn the compensation. They said, further, that whenever you take a man's services or property for less than it is worth, you are taking it without due process of law; that under

such arbitrary action, and under such arbitrary legislation, you are taking it against the provisions of the Federal Constitution as embodied in the Fourteenth Amendment—are depriving him of his property without due process of law.”

Reasonableness a judicial question.—The reasonableness of rates established by statute or by due municipal ordinance, and whether for common carriers or gas companies, is a matter for judicial determination. *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 822.

b. REQUIRING REMOVAL OF GAS WORKS.—A municipal ordinance prohibited the erection or maintenance of gas works except within prescribed limits. Complying with the terms of the ordinance, a person was about to begin the erection of gas works; a tract of land was purchased within the district wherein the erection of such works was permitted; a contract was entered into for the construction of the works and a considerable sum of money was expended. Without changed conditions or adequate reason, after compliance as above stated, the council, by an amended ordinance, drew a line embracing a part of the district including the complainant's property, and declared that that should be prohibited territory. Having partially erected the works, the complainant had acquired property rights, and was entitled to protection against unconstitutional encroachment which would have the effect to deprive him of property without due process of law.

Dobbins v. Los Angeles, (1904) 195 U. S. 223, wherein the court said: “The right to exercise the police power is a continuing one, and a business lawful to-day may in the future, because of the changed situation, the growth of population, or other causes, become

a menace to the public health and welfare, and be required to yield to the public good. But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment.”

c. REQUIRING CHANGE OF LOCATION OF GAS PIPES.—Requiring a change of location of gas pipes so as to make room for the work of a municipal drainage commission does not deprive the gas company of its property without due compensation, when the gas company acquired no exclusive right to the location of its pipes in the streets as chosen by it under a general grant of authority to use the streets, and the city made no contract that the gas company should not be disturbed in the location chosen.

New Orleans Gas Light Co. v. Drainage Commission, (1905) 197 U. S. 453.

27. Turnpike Companies — a. REGULATING RATES.—A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividend whatever for stockholders, is invalid.

Covington, etc., Turnpike Road Co. v. Sanford, (1896) 164 U. S. 594.

b. VACATION OF TOLL ROAD.—A state statute authorizing a probate court to declare a turnpike road abandoned and vacated as a toll road, and thereby to become a free road, without the intervention of a jury, or the right of appeal whereby such jury could be had to determine whether the road or a part thereof has been out of repair for the preceding six months within the statutory meaning, is, to this extent, in conflict with the provision of the

Federal Constitution, that no person shall be deprived of property without due process of law.

Salt Creek Valley Turnpike Co. v. Parks, (1893) 50 Ohio St. 568; *West Alexandria, etc., Turnpike Co. v. Gay*, (1893) 50 Ohio St. 583.

28. Regulating Stockyard Rates. — As to parties engaged in performing a public service, in determining the reasonableness of rates, the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and also the value of the services rendered to each individual. The determination of the legislature is to be presumed to be just, and must be upheld unless it clearly appears to result in enforcing unreasonable and unjust rates.

Cotting v. Kansas City Stock Yards Co., (1901) 183 U. S. 91, wherein the court said that as to the charges which may be made by parties engaged in performing a public service, in the absence of testimony to the

contrary, a customary charge should be regarded as reasonable; *reversing*, on other grounds, (1897) 79 Fed. Rep. 679, (1897) 82 Fed. Rep. 839, (1897) 82 Fed. Rep. 850.

29. Regulating Irrigation Rates. — An order of a board of supervisors of a county fixing the rates which an irrigation company should charge for water distributed by it, which would deprive it from earning a reasonable profit on its investment, amounts substantially to a taking of property without due process of law.

San Joaquin, etc., Canal, etc., Co. v. Stanislaus County, (1898) 90 Fed. Rep. 516.

30. Regulating Business and Rates of Grain Elevators. — A general state statute regulating the business and charges of public warehousemen engaged in elevating and storing grain for profit does not deprive one of his property without due process of law.

Brass v. North Dakota, (1894) 153 U. S. 405, *affirming State v. Brass*, (1892) 2 N. Dak. 482.

A state statute which fixes the maximum of charges for the stowage of grain in warehouses at places in the state having not less than 100,000 inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved," does not deprive the owners of the warehouses of property without due process of law. *Munn v. Illinois*, (1876) 94 U. S. 135, wherein the court said: "Down to the time of the adoption of

the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property [as in the case of statutes regulating ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing fixing the maximum of charge to be made for services rendered, accommodations furnished, and articles sold] necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the states from doing that which will operate as such a deprivation." *Affirming* (1873) 69 Ill. 80.

When Charges Fixed Not Shown to Be Unreasonable. — A state statute fixing the maximum rates which may be charged at grain elevators does not deprive a citizen of his property without due process of law when the records do not show that the charges fixed by the statute are unreasonable.

Budd v. New York, (1892) 143 U. S. 546, wherein the court said: "What was said in the opinion in *Chicago, etc., R. Co. v. Minnesota*, (1890) 134 U. S. 418, as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no

reference to a case where the rates are prescribed directly by the legislature. Not only was that the case in the statute of Illinois in *Munn v. Illinois*, (1876) 94 U. S. 113, but the doctrine was laid down by this court in *Wabash, etc., R. Co. v. Illinois*, (1886)

118 U. S. 557, 568, that it was the right of a state to establish limitations upon the power of railroad companies to fix the price at which they would carry passengers and freight, and that the question was of the same character as that involved in fixing the charges to be made by persons engaged in the warehousing business. So, too, in *Dow v. Beidelman*, (1888) 125 U. S. 680, 686, it was said that it was within the power of the legislature to declare what should be a reasonable compensation for the services of persons exercising a public employment, or to fix a maximum beyond which any charge made would be unreasonable. But in *Dow v. Beidelman*, (1888) 125 U. S. 680, after citing *Munn v. Illinois*, (1876) 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, (1876) 94 U. S. 155, 161, 162; *Peik v. Chicago, etc., R. Co.*, (1876) 94 U. S. 164, 178; *Chicago, etc., R. Co. v. Ackley*, (1876) 94 U. S. 179; *Winona, etc., R. Co. v. Blake*, (1876) 94 U. S. 180; *Stone v. Wisconsin*, (1876) 94 U. S. 181; *Ruggles v. Illinois*, (1883) 108 U. S. 526; *Illinois Cent. R. Co. v. Illinois*, (1883) 108 U. S. 541; *Railroad Commission Cases*,

(1886) 116 U. S. 307; *Stone v. Illinois Cent. R. Co.* (1885) 116 U. S. 347; and *Stone v. New Orleans, etc., R. Co.*, (1855) 116 U. S. 352, as recognizing the doctrine that the legislature may itself fix a maximum beyond which any charge would be unreasonable, in respect to services rendered in a public employment, or for the use of property in which the public has an interest, subject to the proviso that such power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law, the court said that it had no means, 'if it would under any circumstances have the power,' of determining that the rate fixed by the legislature in that case was unreasonable, and that it did not appear that there had been any such confiscation of property as amounted to a taking of it without due process of law, or that there had been any denial of the equal protection of the laws." *Affirming People v. Budd*, (1889) 117 N. Y. 1.

The Mere Requirement of a License to engage in the business of receiving, shipping, storing, or handling grain in an elevator is not forbidden by this section. "We cannot question the power of the state, so far as the Constitution of the United States is concerned, to require a license for the privilege of carrying on business of that character within its limits; such a license not being required for the purpose of forbidding a business lawful or harmless in itself, but only for purposes of regulation."

W. W. Cargill Co. v. Minnesota, (1901) 180 U. S. 468, *affirming State v. W. W. Cargill Co.*, (1899) 77 Minn. 223.

31. Insurance Companies — a. IN GENERAL. — A statute which authorizes a public officer to bring an insurance company before a judicial tribunal which, after full opportunity for defense, may determine whether it is insolvent or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers or violated the rules, restrictions, or conditions prescribed by law, does not deprive such a company of property without due process of law.

Chicago L. Ins. Co. v. Needles, (1885) 113 U. S. 583.

b. REGULATING LIABILITY ON INSURANCE POLICIES. — A statute making void all stipulations in insurance policies which limit liability to less than the full amount of loss, if this does not exceed the full amount of insurance, is not invalid as taking property without due process of law.

Dugger v. Mechanics', etc., Ins. Co., (1895) 95 Tenn. 245.

c. PROHIBITING MAKING INSURANCE CONTRACT OUTSIDE THE STATE. — A state statute which, as construed by the state Supreme Court, prohibits the making of a marine insurance contract outside the state on property then in the state, is invalid as a deprivation of liberty without due process of law.

Allgeyer v. Louisiana, (1897) 165 U. S. 589.

d. LICENSING INSURANCE AGENTS: — It is not a denial of due process of law to require insurance agents or brokers to be licensed before doing business in the state.

Com. v. Roswell, (1899) 173 Mass. 119.

A statute of New York prescribing the conditions, upon which insurance agents may procure policies of insurance from companies not authorized to do business in the state, and providing that "all fire insurance policies issued to residents of this state on property located herein by companies that have not complied with the requirements of the general insurance laws of the state, shall be void except such as have been provided as herein set forth," does not invalidate a policy

not procured as set out in the statute, issued to a resident of New York upon property situated in New York by a Massachusetts company not authorized to do business in New York, where the contract was valid under the laws of Massachusetts and was made and to be performed in that state. To make the statute apply to such a contract would make it violate the Fourteenth Amendment of the Federal Constitution. *Western Massachusetts Mut. F. Ins. Co. v. Hilton*, (1899) 42 N. Y. App. Div. 52.

e. RECOVERY OF ATTORNEY'S FEES AGAINST INSURANCE COMPANIES. — A statute authorizing the recovery of reasonable attorney's fees against life and fire insurance companies in suits upon policies issued by them, does not deprive the companies of property without due process of law.

Tillis v. Liverpool, etc., Ins. Co., (Fla. 1903) 35 So. Rep. 171.

f. REGULATION OF REINSURANCE BY INSURANCE COMPANIES. — A statute prohibiting reinsurance by insurance companies, except with the consent of two-thirds of the holders of the policies to be reinsured and the approval of the secretary of state, is not in violation of the Fourteenth Amendment as taking property without due process of law.

Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co., (1900) 64 N. J. L. 340.

32. Erection of Competing Municipal Plant. — The grant of a franchise to a waterworks company by a municipal corporation does not of itself raise an implied contract that the grantors will not do any act to interfere with the rights granted to the waterworks company, and, in the absence of the grant of an exclusive privilege, none will be implied against the public, but it must arise, if at all, from some specific contract binding upon the municipality. When an ordinance granting such a franchise contains no express stipulation that a city shall not build a plant of its own to supply water for public and private purposes, and the grant is expressly declared not to be exclusive of the right to contract with another company, the erection of a waterworks system for the city does not deprive the waterworks company of property without due process of law.

Helena Water Works Co. v. Helena, (1904) 195 U. S. 388.

In the erection of municipal waterworks by a village, the village is not compelled to take the plant of a private existing company, when the statute authorizing the village to build and operate its works does not require

it to take the plant of the private company. Such action on the part of the village, though resulting in seriously impairing the value of the company's property, does not constitute a taking of its property within the meaning of this provision. *Skanateles Water Works Co. v. Skanateles*, (1902) 184 U. S. 363.

When the Charter of a Water Company Is Not Exclusive, and is subject to repeal, alteration, or amendment at the will of the legislature, the company can suffer no deprivation of property without due process of law from an Act of the legislature empowering the city to erect its own waterworks.

Newburyport Water Co. v. Newburyport, (1904) 193 U. S. 577, in which case a state statute had authorized a city to supply its own water, but prohibited the city from establishing an independent water system if the water company within a certain time elected to offer its property for sale to the city at a price to be agreed upon or to be judicially determined. The Act stipulated that the value of the property "should be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." It was held that when the water company accepted the statute, conveyed its property to

the city, provoked the state proceedings as to the value of the property and derived the benefits resulting from the statute, it could not, because of disappointment at the result of the interpretation which the statute received at the hands of the state court, change its position and cause its voluntary acceptance to become an involuntary one, in order to assail the constitutionality of the legislation in question, on the ground that its property had been taken without due process of law. *Reversing* (1900) 103 Fed. Rep. 584, (1898) 85 Fed. Rep. 723. See also *Gloucester Water Supply Co. v. Gloucester*, (1904) 193 U. S. 580.

33. Regulating Inspection of Mines.—A statute giving to district mining inspectors a discretion as to the number of times they shall inspect such mines, and a further discrimination as to what fees they shall charge, within fixed limits, is not in contravention of this clause, especially in view of the facts that the fees must be paid into the labor bureau of the state, and that the inspectors are paid fixed salaries direct from the bureau.

St. Louis Consol. Coal Co. v. Illinois, (1902) 185 U. S. 207, wherein the court said: "The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health, and comfort, are so obviously within the police

power of the several states, that no citation of authorities is necessary to vindicate the general principle," *affirming* (1900) 186 Ill. 134. See also *Chicago, etc., Coal Co. v. People*, (1899) 181 Ill. 270.

34. Regulating Manufacture and Sale of Goods—*a*. OF INTOXICATING LIQUORS
—(1) *In General.*—A state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said state; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and such legislation by a state is a clear exercise of her undisputed police power, which does not deprive any person of property without due process of law.

Kidd v. Pearson, (1888) 128 U. S. 16, *affirming* *Pearson v. International Distillery*, (1887) 72 Iowa 348. See also *Kansas v. Bradley*, (1885) 26 Fed. Rep. 290; *Burnside v. Lincoln County Ct.*, (1887) 86 Ky. 423; *Ripley v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 15; *State v. Hodgson*, (1893) 66 Vt. 134.

A statute which declares that no person shall own or keep, or be in any way concerned, engaged or employed in owning or keeping, any intoxicating liquors with intent to sell the same within the state, was within the constitutional powers of the state legislature. *Eilenbecker v. Plymouth County*, (1890) 134 U. S. 40.

As a state has authority to prohibit the manufacture and sale of intoxicating liquors for other than medicinal, scientific, and mechanical purposes, it has power to declare that any place kept and maintained for the illegal manufacture and sale of such liquors shall be deemed a common nuisance, and be abated, and, at the same time, to provide for the indictment and trial of the offender. One

is a proceeding against the property used for forbidden purposes, while the other is for the punishment of the offender. *Mugler v. Kansas*, (1887) 123 U. S. 671. See also *Busch v. Webb*, (1903) 122 Fed. Rep. 655.

Taxing sale of intoxicating liquors.—A statute imposing a tax on the business of selling intoxicating liquors, collectible by the treasurer of the county as other taxes are collected, imposing penalties for its nonpayment and for the refusal of a person engaged in the business to sign and verify the statement of the return, on the demand of the assessor, does not deprive citizens of property without due process of law as guaranteed by the Federal Constitution. *Adler v. Whitbeck*, (1886) 44 Ohio St. 539.

Prohibiting sale of liquors to Indians.—A *Minnesota* statute which provides that "whoever sells * * * any spirituous liquors or wines to any Indian within this state shall on conviction thereof be punished, etc.," was held to be valid, as applied to one who was by blood an American Indian, formerly belonging to the Sisseton and Wahpeton

band of Sioux Indians, but had severed all his relations with his tribe, adopted the habits and customs of civilization, and taken up an allotment of land in severalty, under the provisions of the United States "Land in Severalty Act," of February 8, 1887, and thereby became a citizen of the United States as well as of the state in which he resided. *State v. Wise*, (1897) 70 Minn. 99.

Prohibiting the giving of liquor.—A *Kentucky* statute, providing that "it shall be unlawful for any person or persons to sell, barter, give, loan, or traffic in spirituous, vinous, or malt liquors, in any quantity whatever, within the county of Rowan."

This act shall not apply to the procuring or use of wine for sacramental purposes, or to a regular resident practicing physician, who, in good faith, prescribes the same as a medicine to his patient or patients. Nor shall this act or its provisions apply to those who give or furnish spirituous, vinous, or malt liquors to a member or members of their own family, or their invited guests at their own household," is not invalid as denying to a person the use of his property. *Powers v. Com.*, (1890) 90 Ky. 167.

Stock of goods on hand.—A municipal ordinance passed under the authority of a statute was enacted to prohibit ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail. It was held that one who had been in the business of selling distilled, malt, and vinous liquors, and in pursuance of the business had acquired property, a part of which was real estate upon which he had made extensive improvements in the way of fitting it for the purpose of carrying on the business, and had placed therein a stock of liquor, was not deprived of property without due process of law. The ordinance only undertook to prevent him from "keeping" within the limits of the village an ale, beer, or porter house, or a place where intoxicating liquors are sold at retail. He might under it sell his stock in trade in any way he could, except in such a way as would make him such keeper. The ordinance is only a police regulation, in the interest of the public morals, and for the common good; and, although it may in some measure affect the value of his property, or interfere with its use in the purposes for which it was obtained, it does not thereby "deprive" him of

his property. *Tanner v. Alliance*, (1886) 29 Fed. Rep. 197. See *Kessinger v. Vannatta*, (1886) 27 Fed. Rep. 890. But see *Kessinger v. Hinkhouse*, (1886) 27 Fed. Rep. 883; and *Mahin v. Pfeiffer*, (1886) 27 Fed. Rep. 892, as to the deprivation, by a prohibition statute, of a property right in a lease of property for the purpose of keeping a saloon.

Within five miles of university.—An *Alabama* statute, incorporating the Southern University of Greensboro and prohibiting the sale of any kind of spirituous or intoxicating liquors within five miles, does not deprive any person of his property in the sense of the Constitution. *Dorman v. State*, (1859) 34 Ala. 216.

Requiring the removal of screens in liquor saloons during the time when the saloons are required by law to be closed does not deprive any person of liberty or property without due process of law. *Robison v. Haug*, (1888) 71 Mich. 38.

Summary revocation of liquor tax certificate.—It is not competent for the legislature to enact a statute providing that in a proceeding by verified petition and affidavit to revoke a liquor-tax certificate, the holder of the certificate shall file a verified answer, in default of which an order revoking the certificate may be granted, without proof of the matters stated in the petition. The certificate is a species of property and is to be protected as such. *Matter of Cullinan*, (1903) 82 N. Y. App. Div. 445.

Forfeiture for unlawful sales of liquors.—An *Iowa* statute providing for the destruction of liquors found in a place adjudged to be a liquor nuisance, and for the removal and sale of the furniture, fixtures, etc., is valid. In actions, either criminal or equitable, wherein the existence of a nuisance is established under the law in question, the action is against the thing—the place—as well as against the person. In either case the question is whether the place was a nuisance, and, if so, whether the person was engaged in keeping it. Such actions are against the thing as well as the person, and the person has due notice and his day in court, in which to defend against the forfeiture of his property as well as the punishment of himself. *Craig v. Werthmueller*, (1899) 78 Iowa 598.

The fact that Breweries Were Erected When It Was Lawful to engage in the manufacture of beer for every purpose, does not make a statute prohibiting their being so employed in effect a taking of property for public use without compensation, and depriving a citizen of his property without due process of law.

Mugler v. Kansas, (1887) 123 U. S. 664, wherein the court said: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor

restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his

liberty and property, without due process of law."

Property in a brewery.—Between 1870 and 1874, the defendants constructed a brewery in Lawrence, Kansas. The building, machinery, and fixtures were designed and adapted for the making of beer and for nothing else. For such purpose they are worth fifty thousand dollars; for any other use, not to exceed five thousand dollars. At the time of the erection of the building, and up to 1880, the making of beer was as legal, as free from tax, license, or other restriction, as the milling of flour. In that year a constitutional

amendment was adopted, prohibiting the manufacture of beer except for medicinal, scientific, and mechanical purposes. In 1881 and 1885 laws were enacted to carry this prohibition into effect. Under these laws a permit was essential for the manufacture for the excepted purposes. To the defendants this permit was refused. It was held that the constitutional amendment and statutes deprived the owners of property without due process of law, in failing to provide for compensation. *State v. Walruff*, (1886) 26 Fed. Rep. 194. See also *Kansas v. Bradley*, (1885) 26 Fed. Rep. 280.

(2) *Only to Be Manufactured for Certain Purposes.*—A state statute which, as construed by the Supreme Court of that state, provides that intoxicating liquors may be manufactured and sold within the state for chemical, medicinal, culinary, and sacramental purposes, but for no other—not even for the purpose of transportation beyond the limits of the state—is within the police power of the state and in the regulation of commerce. A state has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said state; to inflict penalties for such manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes, and such legislation by a state is a clear exercise of her undisputed police power, which does not deprive any person of property without due process of law.

Kidd v. Pearson, (1888) 128 U. S. 16, affirming *Pearson v. International Distillery*, (1887) 72 Iowa 348.

(3) *Requiring Druggists to Take Out License.*—A state statute providing that spirituous liquors could not be subsequently used in the preparation of pharmacists' compounds without the pharmacist's first procuring a druggist's license from the county commissioners, does not deprive a licensed pharmacist of his property without due process of law.

Gray v. Connecticut, (1895) 159 U. S. 77, affirming (1891) 61 Conn. 44.

b. OF ADULTERATED MILK.—It is not a violation of the Fourteenth Amendment to prohibit the sale of adulterated milk, although there is no fraud or deceit in the sale, and the adulteration in certain cases is harmless.

State v. Schlenker, (1900) 112 Iowa 642.

Prohibiting the sale of milk from cattle fed on "still slop," "brewers' slop," or

"brewers' grains" is a valid police regulation, and does not deprive any person of property without due process of law. *Sanders v. Com.*, (Ky. 1903) 77 S. W. Rep. 386.

c. OF LARD.—A statute which provides that "no manufacturer or other person or persons shall sell, deliver, prepare, put up, expose, or offer for sale any lard, or any article intended for use as lard, which contains any ingredient but the pure fat of healthy swine, in any tierce, bucket, pail, package, or other vessel or wrapper, or under any label bearing the words 'pure,' 'refined,' 'family,' or either of said words, alone, or in combination with other words of like import, unless every tierce, bucket, pail, package, or other vessel, wrapper,

or label, in or under which said article is sold, delivered, prepared, put up, exposed, or offered for sale, bears on the top or outer side thereof in letters not less than one-half inch in length, and plainly exposed to view, the words 'compound lard,' and the name and proportion, in pounds and fractional parts thereof, of each ingredient contained therein," does not impair any right of property or the exercise of any lawful business, but is clearly within the police power of the state.

State v. Snow, (1891) 81 Iowa 643.

d. OF OLEOMARGARINE. — A state statute allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and which, moreover, expressly forbids the manufacture or sale within the state of any oleomargarine which contains any methyl, orange, butter yellow, annatto, aniline dye, or any other coloring matter, does not deprive the manufacturer of his property without due process of law, though the state statutes permit harmless coloring matter to be used in butter.

Capital City Dairy Co. v. Ohio, (1902) 183 U. S. 245.

Proceedings for seizure and confiscation. — A *Minnesota* statute forbids, under special penalties, the sale, exposure for sale, or having in possession with intent to sell, of any article in imitation of butter, not wholly made of milk or cream, and that is of any other color than bright pink; and provides that the dairy and food commissioner may seize such article, and, upon the order of any court having jurisdiction under the Act, sell the same for any purpose other than for food. When every part of the Act is considered it seems apparent that seizure of the articles is only contemplated in connection with prosecutions for the penalty prescribed, when, in the same court and same proceeding, the owner or person in possession being present and on trial, and therefore having a right and opportunity to be heard, if he is convicted the court may condemn the article seized and order its sale under the statute. The statute, therefore, though meagre in its terms, affords, if strictly followed, due process of law. *Armour Packing Co. v. Snyder*, (1897) 84 Fed. Rep. 138.

A *Missouri* statute entitled "An Act to prevent the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy product," is not void as depriving an owner of this product of his property within the meaning of this clause. The statute does not, in direct terms, authorize the seizure or taking of any property, not even that whose manufacture is forbidden. The party is not, in fact, deprived of this property by the statute, or by any proceeding which it authorizes. The personal punishment, by fine and imprisonment, which the statute imposes, must be inflicted according to the law of Missouri, which allows a trial by jury, with all the other forms which from time immemorial have been held to be due process of law. The money fine, then,

and the depriving of liberty are undoubtedly imposed by due process of law. *In re Brosnahan*, (1883) 18 Fed. Rep. 66.

A *New York* statute entitled "An Act to prevent deception in sales of dairy products," which provides that "no person shall manufacture out of any oleaginous substances, or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream of the same, or shall sell or offer to sell the same as an article of food. This provision shall not apply to pure skim milk cheese produced from pure skim milk," is invalid as absolutely prohibiting an important branch of industry for the sole reason that it competes with another and may reduce the price of an article of food for the human race. It is one of the fundamental rights and privileges of every citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. *People v. Marx*, (1885) 99 N. Y. 380, reversing (1885) 35 Hun (N. Y.) 528.

A *Pennsylvania* statute which prohibits the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or prohibits the manufacture of any imitation or adulterated butter or cheese, or the selling or offering for sale, or having in possession with intent to sell as an article of food, is a lawful exercise by the state of the power to protect by police regulations the public health. *Powell v. Pennsylvania*, (1888) 127 U. S. 683. See also *McCann v. Com.*, (1901) 198 Pa. St. 510.

e. OF CIGARETTES. — A municipal ordinance vesting power in the mayor to grant or refuse a license to sell cigarettes is not a deprivation of property without due process of law when the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, and providing the applicant will file a bond as stated in the ordinance as a security that he will faithfully observe and obey the laws of the state and the ordinance of the city with reference to cigarettes.

Gundling v. Chicago, (1900) 177 U. S. 185.

f. OF OPIUM. — A statute providing that "it shall be unlawful to sell or give away opium, or any preparation of which opium is the principal medicinal agent, to any person except druggists and practicing physicians, except on the prescription of a practicing physician, written in the English or Latin language; and the druggist filling such prescription shall keep the same on file for one year, subject to be inspected by any public officer of the state," does not deprive of their property without due process of law persons who own a large amount within the state for the purpose of being sold at retail therein as merchandise. The sale or disposition of such an article has no legitimate use except in medicine, and may be regulated accordingly.

Ex p. Yung Jon, (1886) 28 Fed. Rep. 309.

g. SALE OF PROVISIONS IN STORES SELLING DRY GOODS OR DRUGS. — A statute forbidding the sale of meats, vegetables, or any foodstuffs or provisions, in stores where dry goods, clothing, jewelry, and drugs are sold operates as a deprivation of property without due process of law.

Chicago v. Netcher, (1899) 183 Ill. 104.

h. KEEPING OF MARKETS. — A municipal ordinance prohibiting the keeping of a private market within six squares of any public market of the city does not deprive any one of property without due process of law.

Natal v. Louisiana, (1891) 139 U. S. 622.

Establishing and Regulating City Markets. — An ordinance providing for the establishment and regulation of markets at several points in a city, and prohibiting the sale of fresh meats at retail outside of these markets, except by tenants of the market stall who are permitted to hawk about the streets after eight o'clock A. M. of the day, is not violative of any provision of the National Constitution. Both the necessity for police regulation, in a given instance, and the adaptation of a particular regulation to the specific end in view, are matters entirely of state cognizance and final determination.

Ex p. Byrd, (1887) 84 Ala. 18.

Prohibiting sale of fresh meats outside market house. — When a municipal charter empowers a state to establish market houses, designate, control, and regulate market places, and to regulate the vending of fresh meat, poultry, fish, and other things, no doubt can exist of the power of the city to establish market houses and to require fresh meats to

be sold there, and also to forbid their sale at other places. A person who expends money in preparing a private market place for the conduct of his meat business, does so with the full knowledge that the city might, at any time, forbid the business to be there conducted, and upon the exercise of that power by the city such a person has not been divested of a right nor deprived of his property. *Newson v. Galveston*, (1890) 76 Tex. 564.

A city ordinance regulating the sale of meats which exacted of each and every person engaging in the sale of fresh or salt meat "outside of the public markets," a license costing fifteen dollars, issuable by the mayor of the city upon the direction of the common

council after a two-thirds vote of that body, was held not to be a deprivation of property without due process of law, as vesting in the city officials an arbitrary discretion to refuse to issue licenses. *Buffalo v. Hill*, (1903) 79 N. Y. App. Div. 402.

i. **SELLING FARM PRODUCTS ON COMMISSION.** — A statute declares that it shall be unlawful for any person, firm, or corporation to engage in the business of selling agricultural products and farm produce on commission in the state without first obtaining a license from the state railroad and warehouse commission. A bond with sufficient surety is required for the benefit of consignors, the amount of the penalty to be fixed by the commission; and, if the principal therein is to receive grain for sale, the condition of this bond is that he will faithfully account and report to all persons intrusting him with grain, and will pay over to them all proper proceeds. If grain is not received for sale on commission, the bond is to be conditioned for the faithful performance of the commission merchant's duty. By the second section the merchant who sells grain is required to render a certain statement to his consignor within twenty-four hours after a sale of all or a portion of such grain. The third section relates to products and produce other than grain. If a consignor shall not receive report of a sale or a remittance therefor after demand, or if, after a report is made, he is dissatisfied with it or the sale, he may complain to the railroad and warehouse commission, whose duty it is to investigate the case, and after such investigation to make a written report to the complainant; and this report is made *prima facie* evidence of the matters therein contained. In making this investigation power is conferred upon the commission, in express terms, to compel the merchant "to produce his record or memoranda of such sale, and give them all information in his possession regarding the report and sale so complained of." The statute was held to be valid as a legitimate exercise of the police power of the state, with the design to protect a large class of people, engaged in agricultural pursuits, and more or less remote from market, from imposition and actual fraud when intrusting their products and produce into the hands of commission men for sale.

State v. Wagener, (1899) 77 Minn. 483.

j. **USE OF TRADING STAMPS.** — A statute providing that "no person or company shall in the sale, exchange, or disposition of any property, give or deliver in connection therewith or in consideration of said sale, exchange, or disposition, any stamp, coupon, or other device which entitles the purchaser or receiver of said property or any other person to demand or receive from any person or company, other than the person making said sale, exchange, or disposition, any other property than that actually sold or exchanged; and no person or company other than the person so selling or disposing of property shall deliver any goods, wares, or merchandise upon the presentation of such stamp, coupon, or other device," is void. It is not attempted by the Act to regulate the giving of stamps or coupons redeemable in goods, wares, and merchandise by a person other than the giver of the stamp or coupon, but

it absolutely prohibits such transactions. It prohibits the carrying on of a branch of business or trade that is not affected with a public interest, and has no relation to the public health, morals, or safety, and imposes an arbitrary and unnecessary restraint upon lawful business transactions, and, within the meaning of the Fourteenth Amendment to the Constitution of the United States, is an unlawful restraint upon the liberty of a person to make such contracts, not inconsistent with the lawful rights of others, as he judges for his best interest, and upon the use of his business capacities for a lawful purpose, and falls within the constitutional prohibition, and is not a lawful exercise of the police power of the legislature.

State v. Dodge, (1904) 76 Vt. 197.

A Rhode Island statute providing that "it shall be unlawful for any person or corporation to sell, give, or distribute any stamp, coupon, or other device which shall entitle the purchaser of property to demand or receive from any person or corporation other than the vendor any article of merchandise other than that actually sold to said purchaser; and for any person or corporation other than the vendor to deliver to any person any article of merchandise other than that actually sold upon presentation of any such stamp, coupon, or other device; provided, however, that this act shall not affect any existing contract," was held not to be a valid exercise of the police power. *State v. Dalton*, (1900) 22 R. I. 79, in which case the court said: "In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading-stamp business as some of the cases above referred to inform us it is conducted, although there is no evidence

before us concerning it, nor do we decide that it is not competent for the General Assembly to prohibit it. What we do decide is that the statute in question is so broad as to interfere with the right of an individual to deal with his own property in his own way; that is to say, to make such contracts regarding the sale and disposition thereof as he shall see fit, so long as he observes the rule that each one shall so use and enjoy his own property as not to injure that of another person, and also the further rule that his use of it shall not be injurious to the community; and hence is not a valid exercise of the legislative power."

A Virginia statute entitled "An Act to prohibit the use of trading stamps, trading checks, and similar gift enterprises, and providing a punishment for those who use them" was held not to be a valid exercise of the police power, as attempting to prohibit and restrain a merchant using trading stamps in the lawful prosecution of a lawful business. *Young v. Com.*, (1903) 101 Va. 859.

k. USE OF NATIONAL FLAG FOR ADVERTISING. — A state statute providing that "it shall be unlawful for any person, firm, organization, or corporation to use or display the national flag or emblem, or any drawing, lithograph, engraving, daguerreotype, photograph, or likeness of the national flag or emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation or organization," was held to be invalid, as infringing upon the personal liberty guaranteed by this clause.

Ruhrstrat v. People, (1900) 185 Ill. 134, in which case the court said: "When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his call-

ing, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment." See *People v. Van De Carr*, (1904) 178 N. Y. 425.

l. USE OF UNION LABELS. — A municipal ordinance providing: "Be it enacted that all city printing shall bear the union label of the Nashville Allied Trades Council or the label enacted by the International Typographical Union,"

deprives those not using the union label of the right of pursuing their business avocation to the extent that their bids for public printing will not be accepted.

Marshall, etc., Co. v. Nashville, (1902) 109 Tenn. 497.

A Pennsylvania statute providing for the adoption of trademarks, labels, symbols, or private stamps, by any incorporation or incorporated association or union of workingmen, and prohibiting the use, upon goods not

manufactured by union workmen, of labels declaring them to be so manufactured, does not amount to a taking of property without due process of law contrary to the Fourteenth Amendment. *Com. v. Norton*, (1899) 99 Pa. Dist. 132, *affirmed* (1900) 16 Pa. Super. Ct. 423; *Com. v. Morton*, (1899) 23 Pa. Co. Ct. 386.

m. DECLARING SALES ON MARGIN OR FOR FUTURE DELIVERY VOID. — A statute which makes it an offense for any one to contract to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity is not repugnant to the deprivation of liberty clause.

Booth v. Illinois, (1903) 184 U. S. 426, wherein the court said: "When it is said that the liberty of the citizen includes freedom to use his faculties 'in all lawful ways,' and to earn his living by any 'lawful calling,' the inquiry remains whether the particular calling or the particular way brought in question in a given case is lawful, that is, consistent with such rules of action as have been rightfully prescribed by the state. * * * If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear,

unmistakable infringement of rights secured by the fundamental law."

A California statute declaring that "all contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction," does not violate this clause. *Parker v. Otis*, (1900) 130 Cal. 326, the court saying: "If the provision in question on its face fails to distinguish between *bona fide* contracts and gambling contracts as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the Constitution. * * * The court will always see that legitimate business transactions are not brought under the ban."

A State Constitution Declaring Void All Contracts for the Sale of Shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, does not deprive persons of liberty or property without due process of law.

Otis v. Parker, (1903) 187 U. S. 608.

35. Condemnation Proceedings — a. QUESTION OF NECESSITY. — In condemnation proceedings there is no fundamental right secured by this clause to have the question of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of judicial character, but rather one for determination by the law-making branch of the government.

Backus v. Ft. Street Union Depot Co., (1898) 169 U. S. 568.

b. FOR PRIVATE USE — (1) In General. — The taking by a state of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law.

Missouri Pac. R. Co. v. Nebraska, (1896) 164 U. S. 417.

(2) *Taking Railroad Right of Way for Elevator Sites.* — A state statute which, as construed by the Supreme Court of the state, authorizes the board of transportation to make an order requiring a railroad company to grant to private parties permission to erect an elevator upon its right of way on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon, is a taking of private property for private use.

Missouri Pac. R. Co. v. Nebraska, (1896) 164 U. S. 414. See also Chicago, etc., R. Co. v. State, (1897) 50 Neb. 399.

(3) *Irrigation of Land.* — A statute which provides, under the circumstances stated in the Act, and with reference to the peculiarities which exist in that state, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from a stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless, was held to be within the legislative power of the state.

Clark v. Nash, (1905) 198 U. S. 369, wherein the court said: "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained. Other landowners adjoining the defendant in error, if any there are, might share in the use of the water by themselves taking the same proceedings to obtain it, and we do not think it necessary, in order to hold the use to be a public one, that all should join in the same proceeding or that a company should be formed to obtain the water which the individual landowner might then obtain his portion of from the company by paying the agreed price, or the price fixed by law. The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states, by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the differences of cli-

mate and soil, which render necessary these different laws in the states so situated."

The California statute providing for the irrigation of arid lands was not invalid as a deprivation of property without due process of law. Fallbrook Irrigation Dist. v. Bradley, (1896) 164 U. S. 112, wherein the court said: "Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that in draining swamp lands it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and the kind of land. Some of the swamp lands may not be nearly so wet and worthless as some others, and yet all may be so situated as to be benefited by the reclamation, and whether it is so situated or not must be a question of fact. The same reasoning applies to land which is, to some extent, arid instead of wet. Indeed, the general principle that arid lands may be provided with water and the cost thereof provided for by a general tax or by an assessment for local improvement upon the lands benefited seems to be admitted by counsel for appellees. This necessarily assumes the proposition that water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use, and the assessment upon lands benefited is also levied for a public purpose. Taking all the facts into consideration, as already touched upon, we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." *Reversing* (1895) 68 Fed. Rep. 948.

Legislation establishing drainage districts does not deprive the persons affected of their property without due process of law. Such legislation is a valid exercise of the police power. Baltimore, etc., R. Co. v. North, (1885) 103 Ind. 486.

(4) *Overflowing Land by Erection of Milldam.* — Proceedings under a state statute enacting that any person or corporation authorized by its charter

so to do, may erect or maintain on his or its own land a water mill and mill-dam upon any stream not navigable, paying to the owners of the land flowed the damages which, upon a petition filed in court by either party, may be assessed by a committee or by a jury for the flowing of the lands to the depth and extent to which they may or can be flowed by the dam, is not invalid as a taking of private property for private use and without due process of law. Such a statute is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good in a general sense, as well as to the rights of the riparian proprietors to erect mills and use the water power of running streams, which, without some such regulation, could not be beneficially used.

Head v. Amoskeag Mfg. Co., (1885) 113 U. S. 16.

(5) *Opening of Streets Benefiting Railroad.* — A municipal corporation, through its legislative department, was about to vacate a certain street within its corporate limits and lay out in lieu thereof another street for public use. To do this it was necessary to take, by the exercise of the power of eminent domain, a part of certain lands belonging to the complainant. It was alleged by the complainant, and not denied, that the proposed vacation of the existing street would greatly benefit a railroad company, and that the railroad company had agreed to pay all the expense which would arise on account of the vacation of the one street and the laying out of the other. It was held, every step which had been taken by the common council having been directly in accordance with the requirements of the charter concerning the vacation and laying out of streets by the municipality, that the complainant's property would not be taken without due process of law. The promise of the railroad company to pay such expenses as the proposed action of the common council might cause did not invalidate such acts nor militate in any degree against the contention that the lands of the complainant were to be taken by due process of law.

Barr v. New Brunswick, (1895) 67 Fed. Rep. 402, *appeal dismissed* (C. C. A. 1896) 72 Fed. Rep. 689, on the ground that the Circuit Court of Appeals had not jurisdiction of the appeal.

c. *FOR DRAINAGE FOR AGRICULTURAL PURPOSES.* — The condemnation of property under the power of eminent domain, for the drainage of swamp lands for agricultural purposes purely, and beneficial in this respect to the community, although not intended as a health measure, does not violate the due process of law clause of the Fourteenth Amendment.

Matter of Tuthill, (1899) 36 N. Y. App. Div. 492, *affirmed* (1900) 163 N. Y. 133.

d. *EXPENSES OF OPERATING RAILROAD INCREASED BY OPENING STREETS.* — A railroad company must be deemed to have laid its tracks within the corporate limits of a city subject to the condition that new streets of the city might be opened and extended from time to time across its tracks as the public convenience required, and under such restrictions as might be prescribed by statute. The value to the railroad company of that which was taken from it is the difference between the value of the right to the exclusive use of the land in question for the purposes for which it was being used, and for which it was always likely to be used, and that value after the city acquired the privilege

of participating in such use by the opening of a street across it, leaving the railroad tracks untouched. It cannot recover the expenses that may be incurred in order that the road may be safely operated, as such expenses must be regarded as incidental to the exercise of the police powers of the state.

Chicago, etc., *R. Co. v. Chicago*, (1897) 166 U. S. 255.

e. PROVIDING FOR HEARING. — A statute authorizing the condemnation of property and the opening of streets which declares that notice of such condemnation proceedings, describing the property which may be injuriously or beneficially affected, and fixing a date for hearing remonstrances, must be given by publication in a daily newspaper of general circulation in the city once each week for two weeks, and providing for a hearing of remonstrances before the board of public works before they are finally passed upon, does not deprive the owners of their property without due process of law.

Indianapolis *v. Holt*, (1900) 155 Ind. 222.

A state cannot, by the agency of either its legislative or judicial departments, take the property of any person, for the establishment of a highway or other purpose, "without due

process of law." And this, it is generally agreed, includes at least legal notice of the proceeding and a prescribed opportunity to be heard upon the question involved therein. *Burns v. Multnomah R. Co.*, (1883) 15 Fed. Rep. 183.

f. TRIAL OF ADVERSE CLAIM. — The construction of a law of a state that it is competent for the court to try and determine in a condemnation proceeding an advance claim to an interest in property sought to be condemned, is conclusive on the Supreme Court of the United States, and the entry of the verdict of a jury as to the amount of compensation prior to the filing of written findings on the other issues does not lack due process.

Hooker v. Los Angeles, (1903) 188 U. S. 319.

g. MUST BE PROVISION FOR COMPENSATION — (1) *In General.* — When the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain, but it is a condition precedent to the exercise of such power that the state makes provision for reasonable compensation to the owner.

Sweet v. Rechel, (1895) 159 U. S. 390, *affirming* (1889) 37 Fed. Rep. 323.

Due process of law requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use. *Norwood v. Baker*, (1898) 172 U. S. 277, *affirming* *Baker v. Norwood*, (1896) 74 Fed. Rep. 997.

A statute which makes ample provision for an inquiry as to an assessment of damages for taking property for a public use, and for a review of the proceedings of the court of original jurisdiction by appeal to the highest court of the state, provides due process of law. *Pearson v. Yewdall*, (1877) 95 U. S. 296.

When a state court had jurisdiction of the subject-matter and of the parties, it was under a duty to guard and protect the con-

stitutional rights of the parties, and the final judgment should not be held to be in violation of due process of law enjoined by this amendment, unless by its rulings upon questions of law a party was prevented from obtaining substantially any compensation for property taken for a public use. *Chicago, etc., R. Co. v. Chicago*, (1897) 166 U. S. 247.

Widening streets by condemnation. — The statutes of *New York* relative to the exercise of the power of eminent domain by the city of *New York* and a statute providing for the widening of a certain street, do not operate to take property without due process of law, since these statutes, taken as a whole, provide a sure method of compensation to the owner of the property from the moment the property vests in the city, and any election by the city to recede must be exercised before its title vests. *Browning v. Collis*, (Supm. Ct. Spec. T. 1897) 21 Misc. (N. Y.) 155.

Reference to Fifth Amendment.—In the taking of private property for public use, due process of law requires that compensation shall be made to the owner for the property so appropriated. The Fifth Amendment, operating only as a limitation upon the powers of the general government, fell short of giving to the citizen the full protection to which he was entitled in respect to his life, liberty, and property so far as state action was concerned. It imposed no prohibition or limitation upon the power and authority of the state in dealing with the life, liberty, and property of the citizen. They were left to the restraints of their several constitutions and respective laws on these subjects. So

far as the states were concerned, citizens of the United States were thus left without adequate protection and security in their persons and property. The Fourteenth Amendment was adopted to remedy and correct this defect in the supreme organic law of the land. It involves no forced or unreasonable construction to hold that this Fourteenth Amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the Fifth Amendment had placed upon the authority of the federal government. *Scott v. Toledo*, (1888) 36 Fed. Rep. 392.

(2) *Judgment Without Compensation Secured Invalid.*—A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago, etc., R. Co. v. Chicago, (1897) 160 U. S. 241, wherein the court said: "Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use, means such process as recognizes the right of the owner to be compensated if his property be wrested from

him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

(3) *May Authorize Possession Before Determination of Amount.*—It is not beyond the power of a state in condemnation cases to authorize the taking of possession prior to the final determination of the amount of compensation and payment thereof if adequate provision for compensation is made.

Backus v. Ft. Street Union Depot Co., (1898) 169 U. S. 568.

"It is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the state takes certain rights in it, making provision for compensation only by giving the owners a right of action against

a city for their damages, while the city, which had no part in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined." *Williams v. Parker*, (1903) 188 U. S. 502.

(4) *Tribunal to Assess Compensation*—(a) *In General.*—Where private property is taken for public purposes the legislature cannot fix the compensation or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. When a taking has been ordered the question of compensation is judicial, not legislative.

Newburyport Water Co. v. Newburyport, (1900) 103 Fed. Rep. 586.

By Commissioners or Jury.—In condemnation proceedings there is due process of law when provision is made for an inquiry as to the amount of compensation in some appropriate way before some properly constituted tribunal. It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial

in the ordinary way, or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge.

Backus v. Ft. Street Union Depot Co., (1898) 169 U. S. 569.

In a proceeding by a municipal corporation to condemn a water supply system, it is not essential that the assessment of damages be

made by a jury. Such order may be made by commissioners, at least where there is provision for a review of their proceedings in the courts. *Long Island Water Supply Co. v. Brooklyn*, (1897) 166 U. S. 694.

(b) **Making Findings of Fact by Triers Final.** — In proceedings by a municipal corporation to condemn a water supply system there is no denial of due process of law in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings.

Long Island Water Supply Co. v. Brooklyn, (1897) 166 U. S. 695.

36. Regulating Pursuit of Occupations — a. REGULATING PRACTICE OF MEDICINE — (1) *In General.* — A state statute requires every practitioner of medicine to obtain a certificate from the state board of health, and, among other alternative qualifications, to show that he has practiced medicine in the state continuously for a period of ten years prior to a specified time. No one has a right to practice medicine without having the necessary qualification of learning and skill, and one who, at the time of the passage of the Act, had been practicing six years was not deprived by the statute of his right and estate in his profession without due process of law.

Dent v. West Virginia, (1889) 129 U. S. 114.

"The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine and punishing those who attempt to engage therein in defiance of such statutory provisions is not open to question." *Reetz v. Michigan*, (1903) 188 U. S. 506. See also *Parks v. State*, (1902) 159 Ind. 217; *Driscoll v. Com.*, (1892) 93 Ky. 393; *Craig v. Medical Examiners*, (1892) 12 Mont. 208; *In re Campbell*, (1901) 197 Pa. St. 582; *Com. v. Finn*, (1899) 11 Pa. Super. Ct. 620; *People v. Hasbrouck*, (1895) 11 Utah 306; *State v. Carey*, (1892) 4 Wash. 424; *State v. Currens*, (1901) 111 Wis. 433.

Revoking certificate to practice medicine. — A *Rhode Island* statute providing that "the state board of health may refuse to issue the certificate provided for in section three of this chapter to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, and it may after due notice and hearing revoke such certificates for like cause. In all cases of refusal or revocation, the applicant may appeal to the appellate division of the Supreme Court, which may affirm or overrule the decision of the board," does not deprive any person of due process of law as a full and impartial trial before the highest tribunal of the state is provided after due notice upon charges specifying the grounds of complaint according to the law of the land. *State Board of Health v. Roy*, (1901) 22 R. I. 539.

(2) **Requiring Physicians to Report Contagious Diseases.** — A municipal ordinance providing that "every physician, or person acting as such, who shall have any patient within the limits of said city sick with small-pox or varioloid, or other infectious or pestilential disease, shall forthwith report the fact to the mayor, or to the clerk of the board of health, together with the name of such patient and the street and number of the house where such patient is treated; and in default of so doing shall forfeit and pay not exceeding fifty dollars for each and every such offense," is not invalid as depriving a physician of his

time, and compelling the performance of labor, and so taking his liberty and property without due process of law.

State v. Wordip, (1888) 56 Conn. 224.

b. REGULATING PRACTICE OF DENTISTRY. — An Act providing that any person twenty-one years of age who has graduated at, and holds a diploma from, a university or college authorized to grant diplomas in dental surgery by the laws of any one of the United States, and who is desirous of practicing dentistry in the state, may be examined by said board with reference to qualifications, and after passing an examination satisfactory to the board shall be given a certificate; and that "any graduate of a regular college of dentistry may at the discretion of the examining board" be given a certificate without examination, is not repugnant to the Fourteenth Amendment.

State v. Knowles, (1900) 90 Md. 646.

A Minnesota statute providing that it shall be unlawful for any person to practice dentistry in the state, unless he shall first have obtained a certificate of registration, and filed the same, or a certified copy thereof, with the clerk of the District Court of the county of his residence, as in the Act afterwards provided, and for a board of examiners, and further providing that "in order to be eligible for such examination, such person shall present to said board his diploma from

some dental college in good standing, and shall give satisfactory evidence of his rightful possession of the same: provided, also, that the board may in its discretion admit to examination such other persons as shall give satisfactory evidence of having been engaged in the practice of dentistry ten years prior to the date of passage of this Act. Said board shall have the power to determine the good standing of any college or colleges from which such diplomas may have been granted," was held to be valid. *State v. Vandersluis*, (1889) 42 Minn. 132.

c. REGULATING PRACTICE OF PHARMACY. — A statute which, in effect, required that every person keeping a pharmacy store or shop for retailing, compounding, and dispensing drugs, medicines, and poisons should be a registered pharmacist, or have in his employ a registered pharmacist; and that, if such keeper permitted the vending of drugs, medicines, or poisons in his store or place of business, except under the personal supervision of a registered pharmacist or registered assistant pharmacist, then he should be liable to a penalty of fifty dollars, was held to be constitutional as a valid exercise of the powers of the state.

State v. Heinemann, (1891) 80 Wis. 253.

d. LIMITING RIGHT TO CARRY ON BUSINESS OF BANKING. — A statute which prohibits individuals and firms who are citizens of the United States from carrying on the business of banking, and confers the exclusive privilege of carrying on such business upon corporations organized as provided by an Act of the legislature on the theory that such business is or may be made a franchise by legislative authority, is in violation of section one of the Fourteenth Amendment as depriving citizens of property without due process of law.

State v. Scougal, (1892) 3 S. Dak. 55.

e. PRESCRIBING QUALIFICATIONS OF PILOTS. — A statute declaring a pilot to be an officer, and prescribing the qualifications and regulating the appointment of pilots, designed to protect life and property from the perils incident to

navigation, does not violate the due process of law clause of the Fourteenth Amendment.

Olsen v. Smith, (Tex. Civ. App. 1902) 68 S. W. Rep. 320.

f. REGULATING BUSINESS OF PLUMBING. — An Act requiring plumbers to have a certificate of competency from "the state board of commissioners of practical plumbing" before engaging in the business of plumbing does not deprive any person of property without due process of law.

Singer v. State, (1890) 72 Md. 464.

g. REGULATION OF DAIRIES AND COW STABLES. — Vesting in a municipal assembly the power to permit the erection of dairy and cow stables by certain persons, and to withhold permission from one who had previously erected and used a dairy and cow stable, is not a deprivation of property without due process of law.

Fischer v. St. Louis, (1904) 194 U. S. 369, affirming (1902) 167 Mo. 657.

Regulation of dairymen and milkmen. — A statute making it the duty of dairymen to have their cattle registered with a "live stock sanitary board" created by the statute, and

requiring the board to examine the cattle and premises in which they are kept at least once annually without notice to the owner, is not repugnant to the Fourteenth Amendment as depriving the owner of a right without due process of law. *State v. Broadbelt*, (1899) 89 Md. 565.

h. EMPLOYMENT OF WOMEN IN PLACES OF AMUSEMENT. — A statute providing that "no female person shall be employed in any capacity in any saloon, beer hall, bar room, theatre, or place of amusement where intoxicating liquors are sold as a beverage, and any person or corporation convicted of so employing, or of participating in so employing, any such female person shall be fined not less than five hundred dollars; and any person so convicted may be imprisoned in the county jail for a period of not less than six months," is not repugnant to the Constitution as depriving women of freedom in their choice of vocations, and making it unlawful for them to engage in employment which is lawful for men.

In re Considine, (1897) 83 Fed. Rep. 157.

i. GIVING MONOPOLY TO SLAUGHTER-HOUSE BUSINESS. — A statute incorporating a slaughter-house company prohibited the landing or slaughter of animals intended for food within the city of New Orleans except by the corporation thereby created. It authorized the company to establish and erect within certain territorial limits therein defined one or more stockyards, stocklandings, and slaughter-houses, and imposed upon it the duty of erecting a slaughter-house of a certain capacity. It declared that the company should have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals should be landed at the stocklandings and slaughtered at the slaughter-houses of the company and nowhere else. It was held that the restraint imposed upon the exercise of their trade by the butchers of New Orleans was not a deprivation of property within the meaning of this provision,

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 81.

37. Game and Fish Laws — a. PROHIBITING SALE OF QUAIL. — A statute providing that "every person who buys, sells, offers, or exposes for sale, barter, or trade, any quail * * * is guilty of a misdemeanor," does not violate this amendment.

Ex p. Kenneke, (1902) 136 Cal. 528, the court saying: "Wild game belongs to the whole people, and the legislature may dispose of it as may seem to it best — subject only

to constitutional limitations against discriminations. Within those limitations the legislature, for the purpose of protecting game, may pass such laws as to it seem most wise."

b. POSSESSION OF GAME UNLAWFUL IN CLOSE SEASON. — A statute making it unlawful for any person to have any quail in his possession during the close season, although he may have come into possession of such quail during the open season, deprives no person of property without due process of law.

Smith v. State, (1900) 155 Ind. 611.

Prohibiting the having of certain game in possession or the killing of such game dur-

ing a specified period of time is not in violation of the Constitution of the United States. *State v. Judy*, (1879) 7 Mo. App. 524.

c. PROHIBITING USE OF PARTICULAR KIND OF GUN. — A county ordinance declaring that "every person who, in the county of Marin, shall use any kind of a repeating shotgun, or any kind of a magazine shotgun, for the purpose of killing or destroying any kind of wild duck, geese, quail, partridge, doves, or any other birds, shall be guilty of a misdemeanor," and prescribing a penalty for its violation, was held void, on the hearing of a writ of habeas corpus, as depriving the petitioner of the use of such a gun, and, therefore, depriving him of his property. Where there is no question of the public safety, public health, or public morals, and where the prohibited act is in no respect *malum in se*, the absolute prohibition of the use of one's own property on his own land cannot be held to be a reasonable exercise of the police power when regulation will plainly attain the end desired by the legislation, namely, the prevention of the taking or killing by one person of more than twenty-five quail, partridge, or grouse in any one day.

In re Marshall, (1900) 102 Fed. Rep. 323.

d. LIMITING THE RIGHT TO FISH. — A statute making it unlawful to fish in certain waters except by rod or line does not violate the Fourteenth Amendment of the Federal Constitution, in that it unwarrantably interferes with the property rights of the owners of lakes and bodies of water not excepted from the operation of the statute.

Peters v. State, (1896) 96 Tenn. 682.

Confiscation and destruction of fish nets. — A state statute which prescribed certain regulations in reference to fisheries, and declared nets used contrary to law to be a nuisance, and made it the duty of officers to destroy the nets forthwith when found in violation of the law, the officers being exempt from all liability to the owners on account of the destruction, does not violate the constitutional provision. *Bittenhaus v. Johnston*, (1896) 92 Wis. 588.

The provisions of an Ohio statute were as follows: "No person shall draw, set, place,

locate, or maintain any fish net, trap, pound net, seine, gill nets, or any device for catching fish, as is by law forbidden; and any nets, seines, pound nets, gill nets, placed, located, or maintained in violation of the provisions of the laws of the state, shall be taken wherever found by the fish wardens or other proper officer; and all such nets and other devices for catching fish are hereby declared a public nuisance and shall be forfeited to the state. It shall be the duty of any warden, deputy warden, inspector of fish, sheriff, constable, special warden, or other officer having jurisdiction, forthwith to take up such nets, devices, and articles hereby de-

clared a public nuisance, when found or taken in unlawful use, and hold the same until disposed of according to law. In such prosecutions * * * the court shall, upon conviction, adjudge in addition to the fine and costs by law imposed the forfeiture of such nets."

This statute was held to be contrary to the Constitution of the United States, in that it authorized the confiscation of private property without due process of law. *In re Fish Seizure*, (1896) 5 Ohio Dec. 553.

e. STATUTE MAKING SALE OF CERTAIN FISH UNLAWFUL. — A statute providing that "it shall be unlawful to sell, offer for sale, or have in possession for sale, any species of trout at any time" is not in violation of the Federal Constitution as taking property without due process of law, since the statute permits the person to have such fish in his possession, to eat them or give them away, and hence does not deprive him of his title, but merely limits the rights appurtenant thereto.

State v. Schuman, (1899) 36 Oregon 16, wherein the court said: "That the state, acting in its sovereign capacity, for the best interest of all its citizens, may prohibit the taking or sale of fish within its borders, is settled beyond controversy. When trout are caught in another state, and brought into,

and mingled with, and become a part of, the mass of the property of this state, they become subject to the laws thereof, and defendant, having imported them with knowledge of the existence of such law, must suffer the penalties which it prescribes."

38. Statutes and Ordinances Directed Against Chinese — **a. REGULATING LAUNDRIES.** — A municipal ordinance prohibiting the carrying on of washing and ironing of clothes in public laundries and wash-houses within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning of the following day, is purely a police regulation and is not a violation of any substantial right of an individual.

Barbier v. Connolly, (1885) 113 U. S. 30. See also *Soon Hing v. Crowley*, (1885) 113 U. S. 703.

A municipal ordinance declaring that "no person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order shall wash or iron clothes between the hours of ten o'clock P. M. and six o'clock A. M., nor upon any portion of that day known as Sunday," and declaring it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash-house, where articles are cleansed for hire, within certain limits, without having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire wardens that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property, does not deprive any person of liberty or property without due process of law. *Ex p. Moynier*, (1884) 65 Cal. 34.

Prohibiting keeping laundry within the city. — A municipal ordinance which absolutely and unconditionally forbids the keeping of a laundry for washing clothes for hire at any point within the habitable part of the city violates the clause which secures the personal liberty of the citizen. So, also, as to the laundrymen who have already fitted up

their laundries suitably for the purpose, and established their business, to drive them out to inconvenient and unsuitable localities would be to limit the use of their property and convert it to other purposes and uses to which it is unfitted, and, to that extent, deprive them of their property and its use without due process of law. *The Stockton Laundry Case*, (1886) 26 Fed. Rep. 611.

A city ordinance which makes it an offense to keep a laundry, wherein clothes are cleansed for hire, within the limits of the larger part of a city, without regard to the character of the structures or the appliances used for the purpose, or the manner in which the occupation is carried on, violates this clause. *In re Sam Kee*, (1887) 31 Fed. Rep. 680. See also *In re Hong Wah*, (1897) 82 Fed. Rep. 623.

A municipal ordinance, passed to regulate the establishment, maintenance, and licensing of laundries within certain designated limits, and prescribing punishment for establishing and carrying on the business of a laundry in violation of its provisions, and declaring that after its passage it shall be unlawful for any person "to establish, maintain, or carry on any laundry within that portion of the city and county of San Francisco lying and being east of Ninth and Larkin streets, without having first obtained the consent of the board of supervisors, which shall only be granted upon the recommendation of not less than twelve citizens and taxpayers in the block

in which the laundry is proposed to be established, maintained, or carried on," is invalid as a restraint on the liberty to follow an

inoffensive occupation. *In re Quong Woo*, (1882) 13 Fed. Rep. 229. See also *Ex p. Sing Lee*, (1892) 96 Cal. 354.

b. REQUIRING CHINESE TO MOVE TO DESIGNATED LOCALITIES. — A municipal ordinance requiring all Chinese to remove from the portion of the city heretofore occupied by them, outside the city and county, or to another designated part of the city and county, is invalid.

In re Lee Sing, (1890) 43 Fed. Rep. 360.

c. REQUIRING CHINESE TO BE INOCULATED DURING PLAGUE. — Municipal ordinances, adopted at a time when the bubonic plague was supposed to exist, providing that no Chinese person should depart from the city without being inoculated, were held void as not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion, but as being boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residences of the individual. The conditions of a great city frequently present unexpected emergencies affecting the public health, comfort, and convenience. Under such circumstances, officers charged with duties pertaining to this department of the municipal government should be clothed with sufficient authority to deal with the conditions in a prompt and effective manner. Measures of this character, having a uniform operation, and reasonably adapted to the purpose of protecting the health and preserving the welfare of the inhabitants of a city, are constantly upheld by the courts as valid acts of legislation, however inconvenient they may prove to be, and a wide discretion has also been sanctioned in their execution. But when the municipal authority has neglected to provide suitable rules and regulations upon the subject, and the officers are left to adopt such methods as they may deem proper for the occasion, their acts are open to judicial review, and may be examined in detail to determine whether individual rights have been respected in accordance with constitutional requirements.

Wong Wai v. Williamson; (1900) 103 Fed. Rep. 6.

39. Regulating Production and Use of Natural Gas. — The enforcement of a state statute providing that "it shall be unlawful for any person, firm, or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent, or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes or other safe receptacle, for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes, or other safe and proper receptacles," does not constitute a taking of private property without adequate compensation, and therefore does not amount to a denial of due process of law.

Ohio Oil Co. v. Indiana, (1900) 177 U. S. 190. See also *Jamieson v. Indiana Natural Gas, etc., Co.*, (1891) 128 Ind. 555.

A statute making it unlawful to allow the escape of natural gas and prescribing measures for its confinement, although it may

result in the taking of property, is valid as a precaution adopted for the protection of the public. *Given v. State*, (1903) 160 Ind. 552.

Statute prohibiting wasteful use of natural gas.—A statute prohibiting the use of

natural gas for illuminating purposes in what are known as flambeau lights, as a wasteful use of such gas, does not deprive the owners of the gas of their property without due process of law. *Townsend v. State*, (1897) 147 Ind. 624.

40. Sunday Laws.—A statute requiring the closing of all places of business, with the exception of certain designated classes, from twelve o'clock on Saturday night until twelve o'clock on Sunday night of each week, and punishing violations thereof by criminal penalties, is valid.

State v. Judge, (1887) 39 La. Ann. 136. See also *State v. Fernandez*, (1887) 39 La. Ann. 538.

Prohibiting barbering on Sunday by making the pursuit of that occupation on Sunday a misdemeanor, and imposing a penalty, is a valid exercise of the police power and does not deprive any one of liberty or property without due process of law, as prohibited by the Fourteenth Amendment of the Federal Constitution. *Ex p. Northrup*, (1902) 41 Oregon 489.

Prohibiting barbering on Sunday, except as to those persons who conscientiously believe the seventh day should be observed as Sunday and refrain from work on that day, is not an

infringement of the Fourteenth Amendment of the Federal Constitution. *People v. Bellet*, (1894) 99 Mich. 151.

A Washington statute was as follows: "It shall be unlawful for any person or persons of this state to open on Sunday, for the purpose of trade or sale of goods, wares, and merchandise, any shop, store, or building, or place of business whatever; provided that this section shall apply to hotels only in so far as the sale of intoxicating liquors is concerned, and shall not apply to drug stores, livery stables, or undertakers." It was held that this statute did not conflict with the Federal Constitution as depriving citizens of liberty or property without due process of law. *State v. Nichols*, (1902) 28 Wash. 628.

41. Prohibiting Marriage Between Whites and Negroes.—A statute making it a felony for white persons and negroes to marry and cohabit together as man and wife is not unconstitutional as violating the Fourteenth Amendment.

Lonas v. State, (1871) 3 Heisk. (Tenn.) 287.

A Texas statute providing that "if any white person shall, within this state, knowingly marry a negro, or a person of mixed blood descended from negro ancestry to the third generation inclusive, though one ancestor of each generation may have been a

white person, or, having so married in or out of the state, shall continue within this state to cohabit with such negro or such descendant of a negro, he or she shall be punished by confinement in the penitentiary not less than two nor more than five years," was not rendered void by the adoption of this amendment. *Frasher v. State*, (1877) 8 Tex. App. 264.

42. Insane Persons and Inebriates—*a. SUMMARY COMMITMENT.*—The commitment of persons to hospitals for the insane without an opportunity to be heard and protect their rights is a denial of due process of law.

State v. Billings, (1894) 55 Minn. 467.

Commitment to inebriate asylum without hearing.—A statute of *New York* authorizing the commitment for the term of one year of persons as inebriates and lost to self-control, to the state inebriate asylum, upon *ex parte* affidavits, without any provision for an examination on their own motion as to whether they were or are such inebriates, be-

fore some court or officer and a jury, violates the provision of the Constitution of the United States that no person shall be deprived of liberty without due process of law. *Matter of Janes*, (Supm. Ct. 1866) 30 How. Pr. (N. Y.) 446; *People v. St. Saviour's Sanitarium*, (1898) 34 N. Y. App. Div. 363. See *supra*, p. 434, *Trial by Jury—Issue of Insanity*.

b. PLACING BURDEN OF PROOF AS TO PLEA OF INSANITY ON DEFENDANT.—Under a state statute providing that a person charged with murder who sets up insanity as a defense must establish his insanity by a preponderance of evidence, a failure to charge the jury in such a case, in accordance with the rule of the federal courts, that if, from all the evidence, the jury have a reasonable doubt as to the prisoner's insanity they must acquit, does not violate

the Federal Constitution by depriving the prisoner of life or liberty without due process of law.

Com. v. Barner, (1901) 199 Pa. St. 335.

c. CONFINEMENT OF INEBRIATES. — A statute providing that any person charged with being an inebriate, habitual or common drunkard, shall be arrested and brought before a judge of a court of record for trial, and if convicted shall be sentenced to imprisonment or confinement in any inebriate or insane asylum in the state for a period not exceeding two years nor less than three months, provided some relative or friend shall execute a bond conditioned that he will pay for the support of such inebriate, habitual or common drunkard during his imprisonment and confinement, violates the due process of law clause of the Fourteenth Amendment of the Federal Constitution.

State v. Ryan, (1888) 70 Wis. 676.

43. Compulsory Vaccination. — Under a statute providing that "the board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of all the inhabitants thereof and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit five dollars," a municipal board of health adopted the following regulation: "Whereas, smallpox has been prevalent to some extent in the city of Cambridge and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of the city who have not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated." It was held that the regulation was not invalid as an invasion of the liberty of a person subjected to fine or imprisonment for neglecting or refusing to submit to vaccination.

Jacobson v. Massachusetts, (1905) 197 U. S. 12, in which case the court said: "Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death. No such case is here presented. It is the case of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the

community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease."

Exclusion of unvaccinated pupils from schools. — The action of a school committee, pursuant to statutory authority, excluding from the public schools of a town, after a certain date, all children who have not been properly vaccinated, is not a deprivation of liberty or property without due process of law. *Bissell v. Davison*, (1894) 65 Conn. 183.

44. Delegating Pardoning Power to a Board. — The right to due process of law, protected by the Federal Constitution, is not infringed by a state statute investing a collection of persons not of the judicial department with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state.

Dreyer v. Illinois, (1902) 187 U. S. 83, wherein the court said: "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another depart-

ment of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty."

45. Establishing Harbor Lines. — Contemplated action of harbor line commissioners, appointed under a state statute, in the matter of establishing harbor lines, does not amount to a deprivation of property of one who claims ownership of a wharf and dock on the abutting property.

Yesler v. Washington Harbor Line Com'rs, (1892) 146 U. S. 654.

46. Enforcing State Servitudes or Easements. — The provisions of this amendment do not extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a state to be valid under the constitution and laws of such state. The subject-matter of such rights and regulations falls within the control of the states, and the provisions of this amendment are satisfied if the state law, with its benefits and its obligations, is impartially administered.

Eldridge v. Trezevant, (1896) 160 U. S. 468.

47. Municipal Aid to Abolishing Grade Crossings. — The fact that a city has contributed to the expense of abolishing grade crossings and, incidentally thereto, to the construction of additional tracks, does not make a case of taking property without due process of law.

Wheeler v. New York, etc., R. Co., (1900) 178 U. S. 326.

48. Cancellation of Lease from State. — A lessee for hydraulic purposes in the public waters in the canals of the state, not required for the purposes of navigation, has no vested rights in the lease when the laws do not contain a reservation of the right of the state to resume the privilege whenever it might be deemed necessary for the purposes of navigation, and cannot successfully claim to have been deprived of property without due process of law by a grant by the state to the city of that part of the canal for a public highway and sewerage purposes.

Fox v. Cincinnati, (1881) 104 U. S. 784.

49. Limiting Taxing Power of City to Prevent Payment of Judgment. — A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it, and a state statute so limiting the taxing power of a city as to prevent the receipt of sufficient funds to pay judgments for torts against it, does not deprive the judgment creditors of property without due process of law. "The cases in which we have held that the taxing power of a municipality continues, notwithstanding a legislative act of limitation or repeal, are founded upon contracts; and decisions in them do not rest upon the principle that the party affected in the enforcement of his contract rights has been

thereby deprived of any property, but upon the principle that the remedies for the enforcement of his contracts existing when they were made have been by such legislation impaired."

Louisiana v. New Orleans, (1883) 109 U. S. 239.

50. Giving Discretion to Municipal Officer. — A municipal ordinance providing that "no person shall move any building, or frame of any building, into or upon any of the public streets, lots, or squares of the city, or cause the same to be upon or otherwise to obstruct the free passage of the streets, without the written permission of the mayor, or president of the city council, or in their absence a councillor. A violation of this section shall, on conviction, subject the offender to a fine of not to exceed twenty-five dollars," is not invalid as an unauthorized delegation of power to a single person.

Wilson v. Eureka City, (1899) 173 U. S. 32.

51. Findings of Fact by State Officer. — Findings of fact by a state officer, whose duty it is to attend to the enforcement of all laws against fraud and adulteration or impurities in food, drink, or drugs, do not in themselves constitute a deprivation of property.

Arbuckle v. Blackburn, (1903) 191 U. S. 414.

Act to prevent landing of lewd women in state. — A statute authorizing the commissioner of immigration to determine finally whether there are lewd women among passen-

gers seeking to land, and to prevent such from landing unless bonds are given to indemnify the state against expenses incurred by reason of their vices, does not deny due process of law as guaranteed by the Federal Constitution. *Ex p. Ah Fook*, (1874) 49 Cal. 402.

52. Quarantine Regulations. — A statute which, as interpreted by the Supreme Court of the state, empowers the state board of health to exclude healthy persons from a locality infested with a contagious and infectious disease, which power applies as well to persons seeking to enter the infected place, whether they come from without or within the state, and subjects a vessel engaged in foreign commerce to the restrictions imposed by such a statute, does not operate to deprive the owner of property without due process of law.

Compagnie Francaise, etc., v. Louisiana State Board of Health, (1902) 186 U. S. 385, *affirming* (1899) 51 La. Ann. 645.

53. Riparian Ownership and Rights. — The question of riparian ownership and rights on navigable rivers is to be determined by state law.

St. Anthony Falls Water Power Co. v. St. Paul Water Com'rs, (1897) 168 U. S. 366.

54. Easements of Light and Air. — When a person has acquired title to property, subsequent to judicial decisions of the state assuring him that his easements of light and air were secured by contract, such rights are property rights within the meaning of the Constitution, and cannot be taken away from him without payment of compensation by statute sustained by a change of ruling by the state courts.

Muhlker v. New York, etc., R. Co., (1905) 197 U. S. 570.

55. Enjoining Execution of Judgment for Tort. — A bill in chancery to enjoin the execution of a judgment obtained for a tort committed during the civil war, and a decree granting such relief, does not deprive the judgment creditor of property without due process of law, when subsequent to the rendition of the judgment the state constitution established the rule of law that in such cases the defense that a party was acting in accordance with belligerent rights was a sufficient defense.

Freeland v. Williams, (1889) 131 U. S. 418.

56. Limiting Recovery for Injury to Dog. — A statute which provides "that in civil actions for killing of, or for injuries done to, dogs, the owner cannot recover beyond the amount of the value of such dog or dogs, as fixed by himself in the last assessment preceding the killing or injuries complained of," is constitutional as within the police power of the state.

Sentell v. New Orleans, etc., R. Co., (1897) 166 U. S. 698.

57. Taxation — a. IN GENERAL. — The general and special taxing systems of the states have not been subverted by this amendment. The purpose of the amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the Fifth Amendment against similar legislation by Congress.

Tonawanda v. Lyon, (1901) 181 U. S. 391.
See also *Cass Farm Co. v. Detroit*, (1901) 181 U. S. 396.

The power of taxation is one upon which this amendment places a limitation. *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 397, *affirmed* on other grounds (1886) 118 U. S. 394.

That the indebtedness of a city is in excess of the constitutional limit, and that it is proposed to apply the taxes when collected, to the payment of such unlawful indebtedness, affords no excuse for complainant's failure to pay the taxes. If, when the taxes are paid, the city authorities shall undertake to apply them to the payment of invalid or illegal obligations, it will be time for the complainant to invoke the aid of the court to restrain such misappropriation of the corporate funds. *Forsyth v. Hammond*, (1895) 68 Fed. Rep. 774, *reversed*, and the case remanded with instructions to dismiss for want of jurisdiction, (1897) 166 U. S. 506.

However great the hardship or unequal the burden it cannot be said that a tax collected for public purposes is taking the property of the taxpayer without due process of law. *Kelly v. Pittsburgh*, (1881) 104 U. S. 82.

"It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation. But in order to bring taxation imposed by a state or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation

by its necessary operation is really spoliation under the guise of exerting the power to tax." *Henderson Bridge Co. v. Henderson*, (1899) 173 U. S. 614.

On itinerant vendors. — A *Vermont* statute requiring itinerant vendors to deposit five hundred dollars with the state treasurer and take out a state license and in addition to obtain a local license, which may be granted or refused in the discretion of the local governing board, does not conflict with this clause. *State v. Harrington*, (1896) 68 Vt. 625.

Of bonds and mortgages. — A *Pennsylvania* statute making all bonds and mortgages taxable annually, and requiring that the treasurer of each corporation shall, upon payment of interest, assess a three-mills tax upon the nominal or par value of the bond and withhold the same from the interest paid to the bondholder, and, instead of paying it to the bondholder, turn it over into the state treasury of Pennsylvania, is valid. *Com. v. Delaware, etc., Canal Co.*, (1892) 150 Pa. St. 245. See also *Com. v. New York, etc., R. Co.*, (1892) 150 Pa. St. 234; *Com. v. Lehigh Valley R. Co.*, (1889) 129 Pa. St. 429.

On advertising in cars. — A statute which imposes a tax on the business of advertising in cars, and makes the street-car company or railroad company which leases or sells such advertising privileges liable for the tax, amounts to a taking of property without due process of law in violation of the Federal Constitution. *Knoxville Traction Co. v. McMillan*, (1903) 111 Tenn. 521.

On sheep raising. — An ordinance by a board of county commissioners which singles

out the one industry of sheep raising and under a pretense of licensing that business imposes a certain tax per thousand upon sheep, so that a person having four thousand head pays as much as a person having four thousand nine hundred and ninety-nine, and which affords no protection to sheep raisers, there being nothing to indicate that any such regulation was required or that it has changed in any way the method of conducting the business, is in violation of the Fourteenth Amendment of the Federal Constitution as a taking of property without due process of law. *Cache County v. Jensen*, (1900) 21 Utah 207.

The taxation of farm land within city limits for ordinary city purposes does not deprive the owner of his property without due process of law. *Kelly v. Pittsburgh*, (1881) 104 U. S. 80.

Taxation and confiscation of dogs.—A statute of *Ohio* requiring the owners of dogs in cities of the first class, first grade, to pay a license fee of two dollars for each dog, and providing that if the fee is not paid the dog shall be seized by the Cincinnati Humane Society, and if not redeemed within forty-eight hours shall be destroyed or otherwise disposed of, is unconstitutional as authorizing a taking of property without due process of law. *Fagin v. Ohio Humane Soc.*, (1898) 9 Ohio Dec. 341.

Making payment of tax a prerequisite to resisting void claim under tax sale.—A statute which makes the payment of taxes a condition precedent to defending a claim to title under a void tax sale and deed, violates the due process of law clause of the Federal Constitution. *Eustis v. Henrietta*, (1897) 90 Tex. 468.

b. COMBINATION OF REGULATION AND REVENUE.—It is not a valid objection to an ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

Gundling v. Chicago, (1900) 177 U. S. 189.

c. RETROACTIVE TAXATION.—A state statute is not brought into conflict with the Constitution by the mere fact that it is retroactive in its operation.

League v. Texas, (1902) 184 U. S. 161.

A state statute which provides for a subsection of property which has escaped taxation in prior years, to the taxes of those years, does not deprive one of due process of law when opportunity to question the validity or the amount of the tax is given. *Winona, etc., Land Co. v. Minnesota*, (1895) 159 U. S. 537.

While a state may collect taxes for previous years which were legally payable, but which were overlooked by the assessor or otherwise omitted from the assessment, it is very doubtful whether retroactive taxation may be imposed for previous years upon a class of property not then subject to taxation at all. It would at least be a rare case, and one which would come extremely near

to taking property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. *Covington First Nat. Bank v. Covington*, (1900) 103 Fed. Rep. 527.

Charging back taxes and interest on lands omitted from land books.—The provisions of the *Virginia* code requiring the commissioner of revenue to reinstate land which had been improperly dropped from the land books, and to charge on such land taxes at the rate imposed by law for each year it has been omitted, together with lawful interest on each year's taxes, also making provision to have the action of the commissioner reviewed, and, if erroneous, reversed, is not in conflict with the Fourteenth Amendment. *Douglas Co. v. Com.*, (1899) 97 Va. 397.

d. INTEREST OF ASSESSING OFFICER.—A proceeding before a county auditor for the assessment of property for taxation, lacks "due process of law" on account of the auditor's direct pecuniary interest in the result, where, on making a finding against the taxpayer, he enters an assessment upon the tax duplicate, and the statute gives him four per cent. upon the amount so recovered, but if he fails to discover any property omitted from the taxpayer's return, he

receives no compensation for his services. Such a proceeding is judicial in its nature. "He has the power to issue process; he has parties to the proceeding; he makes a finding, and files his statement of the facts in his office; and then he makes his decision, which is an assessment framed into an amended duplicate, which is certified to the treasurer, and it then becomes a lien upon the taxpayer's property, having all the force and effect of a judgment at law, with all the summary remedies for enforcement hereinbefore set forth. Surely we have here judicial powers and proceedings; and to the person who conducts these proceedings, and has the authority to enter such a judgment, should certainly be applied the disqualification of a direct personal interest in the result — a test which we have seen is universally applied to judges and all persons exercising judicial powers."

Myers v. Shields, (1894) 61 Fed. Rep. 725.

e. FORFEITURE OF LAND ON NONPAYMENT OF TAXES. — A system under which lands liable to taxation are forfeited to the state by reason of the owner not having them placed, or caused to be placed during five consecutive years, on the proper land books for taxation, and causing himself to be charged with the taxes thereon, and under which, on petition required to be filed by the representative of the state in the proper Circuit Court, such lands are sold for the benefit of the school fund, with liberty to the owner, upon due notice of the proceeding, to intervene by petition and secure a redemption of his lands from the forfeiture declared by paying the taxes and charges due upon them, is not inconsistent with the due process of law required by the Constitution of the United States.

King v. Mullins, (1898) 171 U. S. 436.

f. FORECLOSURE OF TAX LIEN BY PROCEEDINGS IN REM. — A statute providing for foreclosure of tax liens by proceedings *in rem* to which the land alone is made a party, and for cutting out all pre-existing rights or liens by sale under decree therein, is not in conflict with the Federal Constitution, as depriving persons of property without due process of law.

Leigh v. Green, (1902) 64 Neb. 533.

g. RIGHT TO REDEEM FORFEITED LANDS. — A state constitution and the statutes of that state, so far as they purport to undertake to forfeit and divest the title of any person to his land and vest the same in another private person, or vest the same in the state without provision for redemption by or on behalf of the owner of the whole or such part of said land as he may desire to redeem, or without provision for a sale thereof and the return of the proceeds to such owner after deduction of all taxes and all proper charges therefrom, attempt to deprive persons of their property without due process of law, and are in contravention of the Fourteenth Amendment to the Constitution of the United States. There can be no valid forfeiture where such right of redemption or receipt of proceeds is prohibited or not provided for.

King v. Hatfield, (1900) 130 Fed. Rep. 564.

h. PENALTIES AND INTEREST FOR NONPAYMENT. — As the state may, in the first instance, enact that taxes shall bear interest from the time they become due, so, without conflicting with any provision of the Federal Constitution, it may in like manner provide that taxes which have become delinquent shall bear interest from the time the delinquency commenced.

League v. Texas, (1902) 184 U. S. 161.

The imposition of penalties and interest for the nonpayment of taxes is not a taking

of property without due process of law. *Missouri, etc., R. Co. v. Labette County*, (1899) 9 Kan. App. 545.

i. COLLECTION BY DISTRESS AND SEIZURE OF PERSON. — Collection of the tax by distress and seizure of the person does not deprive any one of liberty and property without due process of law when the law of the state gives opportunity for objection before the tax commissioner, and if dissatisfied with the final action of the commissioner the party may have that action reviewed on certiorari.

Palmer v. McMahon, (1890) 133 U. S. 669.

j. NEW REMEDIES APPLICABLE TO DELINQUENT TAXES. — A state may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent without any violation of this provision. "A delinquent taxpayer has no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter will not vary the mode of collection. Indeed, generally speaking, a party has no vested right in a mere matter of remedy; that is subject to legislative change. And a new remedy may be resorted to unless in some of its special provisions a constitutional right of the debtor or obligor is infringed."

League v. Texas, (1902) 184 U. S. 158.

k. CONCLUSIVENESS OF TAX TITLE. — A statute cannot prescribe a method by which and the conditions on which property may be sold for taxes, and by the same Act declare that when sold the deed shall be good although the prescribed method was not pursued and the required conditions of sale were not regarded, especially where such conditions are precedent facts essential to confer jurisdiction on the body or person undertaking to sell.

Bannon v. Burnes, (1889) 39 Fed. Rep. 895.

To make a tax deed conclusive evidence that the property which it purports to convey was assessed for taxation; that a tax was levied thereon, and the same was sold upon a warrant issued for that purpose, for the

nonpayment of such tax, when in fact there was neither an assessment, levy, warrant, nor sale, or only any three of them, is a deprivation of property without due process of law. *Kelly v. Herrall*, (1884) 20 Fed. Rep. 364.

l. REMOVING OBJECTIONS TO TAX TITLES. — A law enacted to give to purchasers confidence in the sufficiency of tax titles by cutting off all objections to such titles except that the taxes were not chargeable or had been paid, but reserving to the landowner the absolute right of redemption for two years after the sale, does not contravene the Fourteenth Amendment of the Constitution of the United States as a taking of property without due process of law.

Virginia Coal Co. v. Thomas, (1899) 97 Va. 527.

m. OF RAILROADS — (1) On a Mileage Basis. — When a railroad runs through two states, mileage basis of apportionment is usually a proper one, but there may be exceptional cases, as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for the sole use in such localities an extra amount of rolling stock.

Pittsburgh, etc., R. Co. v. Backus, (1894) 154 U. S. 431, *affirming* (1892) 133 Ind. 625.

If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, it is not a valuation of property outside of the state, and the assessing board, in order to keep within the

limits of state jurisdiction, need not treat the part of the road within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road, where no special circumstances exist to distinguish between the conditions in the two states, such as terminal facilities of enormous value in one but not in the other. Cleveland, etc., R. Co. v. Backus, (1894) 154 U. S. 443.

(2) *Subjected to Special Method of Taxation.* — Statutes which divide the railroad companies in the state into two classes, (1) those "not paying an *ad valorem* tax to the state" and (2) those paying such tax, and impose a privilege tax upon those of the former class only, do not deprive a railroad company of its property without due process of law, though the statutes apply to only two of the seventy-five railroad companies operating or controlling lines of road in the state.

Knoxville, etc., R. Co. v. Harris, (1897) 99 Tenn. 704.

A difference in the mode of assessing railroad and other property, in that the latter is valued and assessed by assessors and county boards of review, with a right of hearing on the part of the owners before the county board of review, which has power to correct errors, with a right of appeal from such board

to the state board, while railroad property is valued and assessed in the first instance by the state board, with a right of hearing before such board, which has power to correct errors, is not a denial of due process of law to the owners of railroad property. Indianapolis, etc., R. Co. v. Backus, (1892) 133 Ind. 609; Pittsburgh, etc., R. Co. v. Backus, (1892) 133 Ind. 625.

(3) *Municipal Tax Compared to Local Receipts.* — A municipal ordinance imposing license taxes, the clause as to railroads being: "Railroads, each company having an office in, or running cars through or into this city for the business of transporting freight or passengers from Alabama City to other points in this state, and from other points in the state to Alabama City, \$50," was held to be a deprivation of property without due process of law, as to a company whose revenue on business done within the town did not exceed two hundred dollars per annum, a sum not equal to the expenses incurred in operating the railway within the city.

Nashville, etc., R. Co. v. Alabama City, (1901) 134 Ala. 419.

(4) *Special Mileage Tax on Street Railway.* — A city with statutory authority to grant or refuse a franchise to a street railway company, as "it shall deem for the best interest of the public," does not deny due process of law to a particular street railway on which it imposes a special mileage tax, there

being no general statute fixing a uniform mileage tax on all railways in the city.

Chicago Gen. R. Co. *v.* Chicago, (1898) 176 Ill. 253.

n. OF BRIDGE OUTSIDE LOW-WATER MARK BY CITY. — That bridge property outside of low-water mark, within the statutory boundary of the city, is so far beyond the reach of municipal protection that it cannot be said to receive any benefits whatever from the municipal government; and that to impose taxes for the benefit of the city upon such property is a taking of private property for public use without just compensation, and therefore inconsistent with due process of law ordained by the Fourteenth Amendment, does not so clearly appear as to entitle the bridge company to invoke the principle that private property cannot be taken for public use without just compensation.

Henderson Bridge Co. *v.* Henderson, (1899) 173 U. S. 614.

o. OF CORPORATION FRANCHISE. — The franchise granted to a company, chartered by a state, to build and operate a bridge, may be included in the value of the company's property for taxation.

Henderson Bridge Co. *v.* Kentucky, (1897) 166 U. S. 153, *affirming* (1895) 99 Ky. 623.

Of Extraterritorial Franchise. — A ferry franchise derived from Indiana to transport persons and property across the Ohio river from the Indiana shore to the Kentucky shore is an incorporeal hereditament derived from having its legal *situs* in the state of Indiana, and the taxation of that franchise by Kentucky is a deprivation by that state of the property of the ferry company without due process of law.

Louisville, etc., Ferry Co. *v.* Kentucky, (1903) 188 U. S. 398.

p. OF CAPITAL STOCK ESTIMATED ON EXTRATERRITORIAL PROPERTY. — The collection of a tax on the capital stock of a corporation on an appraisal arrived at by including therein tangible property which is beyond the jurisdiction of the state would amount to the taking of property without due process of law.

Delaware, etc., R. Co. *v.* Pennsylvania, (1905) 198 U. S. 358.

q. TAXING DEBT HELD AGAINST NONRESIDENT. — The Constitution does not prohibit a state from taxing, in the hands of one of its residents, a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides; so long as the state, by its laws prescribing the mode and subjects of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, the Supreme Court, as between the state and its citizen, can afford him no relief against state taxation, however unjust, oppressive, or onerous.

Kirtland *v.* Hotchkiss, (1879) 100 U. S. 498.

r. **TAXING CREDITS DUE NONRESIDENTS.** — Taxing credits due to a resident of another state from residents within the taxing state for moneys loaned and invested by the agent of the creditor resident within the taxing state, is not a deprivation of property without due process of law.

Bristol v. Washington County, (1900) 177 U. S. 141.

Mortgage interest in land. — A statute of *Oregon* which provides for the taxation as real estate of a mortgage interest in land, does not deprive a nonresident mortgagee of property without due process of law. The statute expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of

the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, this interest, like any other interest legal or equitable, may be taxed to its owner whether resident or nonresident, in the state where the land is situated, without contravening any provision of the Constitution of the United States. *Savings, etc., Soc. v. Multnomah County*, (1898) 169 U. S. 422, *affirming* (1894) 60 Fed. Rep. 31.

s. **SUCCESSION TAX.** — A state statute imposing a transfer tax does not take property without due process of law when there are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition. The provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them. The moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens. Nor is it claimed that the amount or rate of the taxation is excessive to the extent of confiscation.

Orr v. Gilman, (1902) 183 U. S. 287. See also *State v. Hamlin*, (1804) 86 Me. 498.

State inheritance tax. — A state statute imposing a tax of five per centum upon the value of the property passing to any person not within certain degrees of consanguinity to the decedent by will or the intestate laws

of the state, from any person who may die seized or possessed of the same while being a resident of the state, or which is within the state at the time of his death, is valid, as, under the statute, the assessment is made by a judicial officer after notice and opportunity to be heard by the parties interested. *Wallace v. Myers*, (1889) 38 Fed. Rep. 184.

t. **SPECIAL TAX FOR SCHOOL PURPOSES.** — The levy and enforcement of a tax for the support of public free schools, regularly imposed by statutory authority, is not a taking of property without due process of law within the prohibition of the Federal Constitution.

Werner v. Galveston, (1888) 72 Tex. 22.

u. **TOLLS FOR USE OF NAVIGABLE WATERS.** — An exaction of tolls under a state statute for the use of an improved waterway is not a deprivation of property within the meaning of this amendment. To encourage the growth of internal commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen channels and improve them in other ways, and to meet the cost of such improvements the state may levy a general tax or lay a toll upon all who use the rivers and harbors as improved.

Sands v. Manistee River Imp. Co., (1887) 123 U. S. 295, *affirming* *Manistee River Imp. Co. v. Sands*, (1884) 53 Mich. 593.

v. **ASSESSMENTS FOR PUBLIC IMPROVEMENTS** — (1) *In General.* — A state statute authorizing the cost of improvement of streets and other ways to be

assessed against the owners of lots, and giving a lien thereon for such assessments, subjecting the power vested in the local government to the supervision of the courts where the particular facts in each case could be examined and the controversies determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation, does not deprive the owners of such lots of property without due process of law.

Walston v. Nevin, (1888) 128 U. S. 581, affirming (1887) 86 Ky. 492.

Excelsior Planting, etc., Co. v. Green, (1887) 39 La. Ann. 455.

Assessments for local improvements, if properly conducted, are not obnoxious to the objection that they deprive a citizen of his property without due process of law. *Lovenberg v. Galveston*, (1897) 17 Tex. Civ. App. 166.

The United States courts cannot say that, as matter of law, a state statute which makes the cost of paving a street in a city assessable upon the abutting properties and a lien thereon, is unconstitutional. *Chadwick v. Kelley*, (1903) 187 U. S. 543, affirming (1901) 104 La. 719.

A statute which requires a municipal council in the first instance to ascertain the total cost of a particular improvement, then to ascertain the portion thereof legally chargeable upon the adjacent property, and then to assess this amount according to law upon the property abutting on the improvement, and further, clothes the council with ample power to levy the assessment with reference to the benefit received, after giving due notice to the property owners, and with full opportunity to the taxpayers to be heard upon the matter of the assessment proposed, cannot be held to be a violation of this amendment. *Burlington Sav. Bank v. Clinton*, (1901) 106 Fed. Rep. 274.

An ordinance authorizing the street commissioner of a city to assess the amount of a special tax for street improvement, after notice by newspaper advertisement of the time and place of the assessment at which all persons interested might be heard, and limiting the amount of the tax to the value of the benefit conferred, and authorizing appeals to the city court by persons dissatisfied with the assessment, is not unconstitutional as taking property without due process of law. *Baltimore v. Ulman*, (1894) 79 Md. 469.

Where private property is benefited by public improvement, the assessment against it by the proper authorities for its proportionate share of the cost of the improvement, not exceeding the benefit which the property derives by reason of such improvement, does not in any way increase the burdens of the owner as a taxpayer, and is not the taking of private property without due process of law, but is simply an assessment for benefits. The benefits to the property, by reason of the improvements, compensate for the assessment. *Heman v. Allen*, (1900) 156 Mo. 534.

Personal property may be subjected to local assessments when such property is benefited by a public work or improvement.

Sprinkling streets at expense of abutting owners.—An Act of the legislature authorizing a city to provide for the sprinkling of certain of its streets at the expense of the abutting owners according to their frontage, is valid. Such an Act does not impose a local assessment on such owners in substantial excess of the benefits received, so as to be a taking of property without due process of law. *Sears v. Board of Aldermen*, (1899) 173 Mass. 71.

Water frontage tax.—A statute of *Minnesota* authorizing a city board to assess upon each and every lot in the city of St. Paul in front of which water pipes are laid, an annual assessment of ten cents per linear foot of the frontage of such lots, for which, if unpaid, the real estate is made subject to a lien and all penalties and charges as property delinquent for taxes for state and county purposes, denies the lot owners due process of law as guaranteed by the Fourteenth Amendment of the Federal Constitution. The specific objections to the statute are declared by the court to be: "First. That no distinction is made in the class or kinds of water pipes; whether principal feed mains or branch supply pipes, all kinds, of whatever description, being subject to the tax. Second. Each lot in the city of St. Paul, no matter what its location or value or use, whether improved or unimproved, whether large or small, whether in the semi-country or in the city, whether adapted and used for pasturage or a business block—each 'lot' is treated in the same manner, and subject to the same tax, according to its lineal foot frontage. Third. The tax is not for one year or any specified time, but is to be levied annually, for all time, and is made obligatory on the board of public works. Fourth. This tax is not levied for any particular purpose. When collected, it is to be paid over to the city of St. Paul, for the use of the board of water commissioners; but the law is silent as to whether it is to be expended in repairing the main in front of the lots upon which the tax is levied, or to pay for money advanced by the board of water commissioners for the original construction of the main in front of the lots assessed, or whether it is to be used in payment of the current expenses of the board. Fifth. There is no provision for a hearing upon the question as to whether this tax is equitably distributed, or whether the property so assessed is benefited thereby." *State v. Robert P. Lewis Co.*, (1901) 82 Minn. 390.

Requiring riparian owners to build docks.—Provisions of a city charter authorizing

the common council to order riparian owners to build docks along a navigable river or harbor and, if they fail to do so within the time specified, to award contracts for the work and charge the cost as a special assessment upon the property upon or in front of which the docks are built, regardless of the question of special benefits accruing thereto, are invalid as authorizing the taking of property without compensation and without due process of law, in violation of section 1 of the Fourteenth Amendment. *Lathrop v. Racine*, (1903) 119 Wis. 461.

A West Virginia statute gave the common council of a city, town, or village power "to lay off, vacate, close, open, alter, curb, pave, and keep in good repair roads, streets, alleys, sidewalks, crosswalks, drains, and gutters for the use of the public, or any of the citizens thereof, and to improve and light the same, and have them kept free from obstructions on or over them; to regulate the width

of sidewalks on the streets, to order the sidewalks, footways, crosswalks, drains, and gutters to be curbed and paved and kept in good order, free and clean, by the owners or occupants thereof, or of the real property next adjacent thereto." It was held that under this statute the common council could pave any street within its jurisdiction that it deemed expedient to pave. An amendment to this statute required that in paving cross streets and alleys "the petition for paving of such streets in order to charge the owners of abutting property thereon between any two cross streets or between a cross street and an alley * * * must be signed by the owners of a greater amount of frontage on the street proposed to be paved between any two cross streets or between a cross street and alley." It was held that this statute as amended did not violate the Fourteenth Amendment by depriving persons of property without due process of law. *Dancer v. Mannington*, (1901) 50 W. Va. 322.

(2) *According to Area*. — A state statute which provides in the case of original construction that it shall be made at the exclusive cost of the adjoining owners, to be equally apportioned according to the number of feet owned by them, and in case of a square or subdivision of land bounded by principal streets, that the land shall be assessed half-way back from the improvement to the next street, is valid.

Louisville, etc., R. Co. v. Barber Asphalt Paving Co., (1905) 197 U. S. 433, wherein the court said: "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the Act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the Act as embodying a principle generally fair and doing as nearly equal justice as can be expected, seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things."

A statute which provides that a city council shall enact by ordinance that the expense of public improvements shall be paid by an entire district, each lot therein to pay by special assessment the quotient found by di-

viding the whole expense by the entire number of lots, the assessment on each lot to be proportioned to its area, does not take the property of the taxpayer without due process of law in excluding the consideration of the benefits of the improvement to the property which is to bear the burden thereof. *Minnesota, etc., Land, etc., Co. v. Billings*, (C. C. A. 1901) 111 Fed. Rep. 972.

Municipal ordinances passed in conformity to statutes requiring the cost of improvements to be apportioned equally among the owners of property according to the number of square feet owned by them respectively and embraced within certain specified boundaries, but without taking into consideration any estimate of damages or benefits thereto by reason of such improvements, provide a method for creating and enforcing a demand against the property owner which is not violative of his rights as the same are guaranteed by the Constitution of the United States. *Zehnder v. Barber Asphalt Paving Co.*, (1901) 108 Fed. Rep. 570.

(3) *According to Frontage*. — The method adopted in the charter and ordinance of a city of charging the cost of paving a street against the adjoining lots according to their frontage, is not inconsistent with constitutional principles.

French v. Barber Asphalt Paving Co., (1901) 181 U. S. 327. See also *Shumate v. Heman*, (1901) 181 U. S. 402; *Farrell v. West Chicago Park Com'rs*, (1901) 181 U. S. 404; *Martin v. Wills*, (1901) 157 Ind. 153.

An assessment for street improvement upon a linear foot basis is not repugnant to

the Fourteenth Amendment. *Augusta v. Taylor*, (Ky. 1901) 65 S. W. Rep. 837.

Where land is appropriated for a street improvement, an assessment by the foot front of the property bounding and abutting upon the improvement, to pay the cost thereof, without the passage, notice, and publication

of a preliminary resolution declaring the necessity of the improvement, will not thereby be a taking of property without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States. *Caldwell v. Carthage*, (1892) 49 Ohio St. 334.

The assessment of the costs of paving against abutting owners according to frontage is not in violation of the Fourteenth Amendment of the Constitution, as being an arbitrary exaction. *Cass Farm Co. v. Detroit*, (1900) 124 Mich. 433.

(4) *With Regard to Special Benefits.* — A municipal ordinance making an assessment per front foot upon property abutting on property condemned and appropriated for a street, for a fixed sum representing the whole cost of the improvement, is invalid, when the cost of the improvement is in substantial excess of the special benefits to the extent of such excess. "We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

Norwood v. Baker, (1898) 172 U. S. 279, affirming *Baker v. Norwood*, (1896) 74 Fed. Rep. 997. See also *Lyon v. Tonawanda*, (1899) 98 Fed. Rep. 364, in which case the court said of the *Norwood v. Baker* Case: "The opinion of the court contains an exhaustive review of the judgments of state and national courts and the opinions of eminent text writers on the subject, and reaches conclusions which may be summarized as follows: First. Abutting owners may be subjected to special assessments to meet the expenses of opening and improving public highways, upon the ground that special and peculiar benefits accrue therefrom, and the legislature has a wide discretion in defining the territory to be deemed specially benefited. Second. The principle underlying special assessments of this character is that the property is peculiarly benefited and, therefore, the owners do not pay anything in excess of what they receive by reason of the improvement. Legislative power is limited by this principle. The protection of private property would be seriously impaired were the rule established that the legislature may assess such property by the front foot with the entire cost of an improvement, whether the property is in fact benefited or not. Third. 'The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.' Any substantial sum taken from the landowner beyond the exceptional benefit received by him is extortion. Although the legislature may prescribe the rule for the apportionment of benefits, this rule must be one under which it is legally possible that the burden may be distributed justly and equally. While abutting property may be assessed for improvements to a public street in front of it, such assessment must be measured by the special benefits accruing to such abutting property, namely, benefits not shared by the general public. The taxing of private property for profits and advantages which accrue exclusively to the public at large, and which con-

fer no benefits upon the property so taxed, is taking private property for public use without compensation. Fourth. Where an assessment is illegal because it rests upon a principle which excludes the consideration of benefits to the land assessed, it is unnecessary for the owner, as a condition of obtaining relief in equity, to pay or tender such a sum as he may concede due upon an assessment properly and legally made," and also *Loeb v. Columbia Tp.*, (1899) 91 Fed. Rep. 37, reversed on other grounds (1900) 179 U. S. 488; *Lyon v. Tonawanda*, (1899) 98 Fed. Rep. 364; *Adams v. Shelbyville*, (1900) 154 Ind. 467; *Sears v. Board of Aldermen*, (1899) 173 Mass. 71; *Hutcheson v. Storrie*, (1899) 92 Tex. 685, reversing (Tex. Civ. App. 1898) 48 S. W. Rep. 785.

"In a series of decisions recently rendered, the Supreme Court of the United States has corrected a common misunderstanding of the decision of that court in the case of *Norwood v. Baker*, (1898) 172 U. S. 269-303. * * * In these several decisions the Supreme Court recognizes the fact that the per front foot plan may be a perfectly fair method of apportioning the burden of paying for street improvements, and that in cases in which it appears that assessments levied according to that plan are not in excess of the benefits to the property assessed, and are equal and fair, so that there is no ground for complaining of actual injustice, the assessments are not necessarily in violation of the Constitution of the United States merely because made according to the per front foot plan; and it is shown that no such inflexible rule was announced or intended by the court in its decision in the case of *Village of Norwood v. Baker*. That decision, however, does emphatically declare these important principles: That state laws providing for assessing the cost of street improvements upon abutting property, which in practical operation do confiscate property, are obnoxious to the Fourteenth Amendment to the Constitution of the United States, and for that reason it is the duty of the courts to declare them to be void. That special

assessments to pay for local improvements of public streets and highways do, in practical effect, deprive owners of their property without due process of law, unless the property subject to assessment is benefited by the improvement correspondingly to the amount of the assessment." *White v. Tacoma*, (1901) 109 Fed. Rep. 33.

There is a flagrant disregard of a constitutional right whenever an attempt is made to levy a special assessment for a local public improvement without reference to the particular benefit to accrue to the property subjected to such special assessment by reason of the improvements. Streets and highways are for the use and convenience of the public, and private property can only be burdened with the cost of improving the same upon the theory that the improvements have a direct tendency to enhance the value of land in the immediate vicinity to a much greater degree than property more remotely situated, and it is just that the property so benefited should be required to contribute a proportionate share of the expense of creating such increased value. *Cowley v. Spokane*, (1900) 99 Fed. Rep. 844.

An assessment of the entire cost of a public improvement, consisting of a sewer, against the abutting property owners in proportion to their frontage, without reference to the special benefits conferred, rests upon an illegal basis, and is in contravention of the Fourteenth Amendment prohibiting the taking of property without due process of law. *Scranton v. Levers*, (1900) 9 Pa. Dist. 176, affirmed (1901) 200 Pa. St. 56.

A local assessment for public works levied not on taxable property generally for common public benefit, but only on particular property specially benefited as an equivalent for the direct benefit conferred, in order to be free from the constitutional objection of taking property without due process of law, must have reference to public works of a character to confer special benefit on the district assessed, and be actually beneficial to the persons and property subjected to it, and not in excess of the benefit conferred. *Excelsior Planting, etc., Co. v. Green*, (1887) 39 La. Ann. 455.

Special tax for sidewalk construction.—An Act providing for the construction of sidewalks by a special tax without limiting the amount of the tax to the value of the improvements does not deprive the property owners of property without due process of law, where the property owner is protected from arbitrary exactions by the rule that the tax must be reasonable and not oppressive or unjust. *Job v. Alton*, (1901) 189 Ill. 256.

Assessment exceeding increase in value valid.—A statute which assesses the entire cost of paving a street against the abutting property owners in proportion to frontage is not repugnant to the Fourteenth Amendment of the Federal Constitution, as taking property without due process of law, although the assessment may exceed the actual increase in the value of the abutting property

by reason of the paving. *Webster v. Fargo*, (1900) 9 N. Dak. 208.

Laws authorizing taxation for drainage purposes do not deprive taxpayers of their property without due process of law because the burden of taxation may not always fall upon the individuals benefited in proportion to the benefit received. *Burguières v. Sanders*, (1903) 111 La. 109.

Adjudication of irrigation benefits.—Where an original irrigation law provides for an assessment, by acreage, and fails to provide a method by which the benefits received may be adjudicated, but the amendatory Act fully provides such a method, the statute is not in violation of the Federal Constitution as taking property without due process of law. *Pioneer Irrigation Dist. v. Bradley*, (1902) 8 Idaho 310.

An Indiana statute providing that the entire cost of a street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it, and providing for no notice and hearing to ascertain and determine the actual benefits specially received by the landowner by reason of such improvement, but only for a notice and hearing to revise and correct the report and estimate of the engineer, so as to make it conformable to the basis of assessment prescribed in the statute, is invalid. *Charles v. Marion*, (1900) 100 Fed. Rep. 539, (1899) 98 Red. Rep. 166.

A Missouri statute authorizing the apportionment of the costs of repaving a street in cities of the third class on blocks and lots abutting thereon according to the front foot, without regard to the question of fact whether or not the given parcel of land is benefited thereby to the extent of the assessment, and without affording the property owner an opportunity to question the existence of such benefit, is in contravention of this amendment to the Federal Constitution, and is therefore void. *Fay v. Springfield*, (1899) 94 Fed. Rep. 409, wherein the court said: "Statutes in this and other states, which provide that the cost of such improvement shall be assessed where the lots touch, according to their value, furnish more nearly a rule of equality, for they are based upon the underlying principle of the revenue laws of the state, which require every citizen to contribute towards the burdens of government according to the assessed value of his property or benefit his property receives. At all events, it is less instinct with inequality and injustice than the front-foot rule, which utterly ignores the relative benefits received by the several lots called upon to contribute."

Ohio statutes which authorize a municipal corporation to appropriate property for the purpose of a public highway, and to do this in a way which will not only exempt it from the duty and obligation of compensating the owners for the property taken, but impose upon them, under the form of an assessment by the foot front, the burden of compensating

themselves or of returning to the city all they may be entitled to receive as compensation for their property, are wanting in that

"due process of law" required by the Federal Constitution. *Scott v. Toledo*, (1888) 36 Fed. Rep. 396.

(5) *On Property Depreciated by the Improvement.* — Where a complainant can show that the city, for public convenience, has cut down one street so as to deprive him of the beneficial use of a forty-foot alleyway designed to afford access to his property, and that the deprivation of the use of the alley depreciates the value of his property so that it is of less value with the street improved than it would have been without the improvement, any assessment of the cost of grading the street against such property would be a deprivation of property without due process of law.

White v. Tacoma, (1901) 109 Fed. Rep. 34.

(6) *Taxing District in Legislative Discretion.* — The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion.

Spencer v. Merchant, (1888) 125 U. S. 355, wherein the court said: "When the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

It is within the power of the legislature of the state to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said districts, either according to valuation, or superficial area, or frontage. *Webster v. Fargo*, (1901) 181 U. S. 395. See also *Cass Farm Co. v. Detroit*, (1901) 181 U. S. 396; *Detroit v. Parker*, (1901) 181 U. S. 399.

A charter of a city making each street or portion of a street improved a taxing district, by requiring the total cost of improvements on each street or portion of street improved to be ascertained, and one-third thereof to be assessed on the property of abutting owners in proportion to their frontage, and providing for notice of the assessment to the owners and an opportunity to be heard and resist the assessment, does not deprive the owner of his property without due process of law. *Hilliard v. Asheville*, (1896) 118 N. Car. 845.

(7) *Assessments According to Laws Enacted After Improvements Made.* — A change in the law authorizing the method of making assessments on property for public improvements, enacted after improvements have been made, does not deprive an owner of property without due process of law, though the change result in a higher assessment than could have been made under the old law.

Seattle v. Kelleher, (1904) 195 U. S. 356.

(8) *New Assessment in Lieu of Prior Illegal Assessment.* — Where a special assessment to pay for a particular work has been held to be illegal, no violation

of the Constitution of the United States arises from a subsequent authority given to make a new special assessment to pay for completed work.

Lombard v. West Chicago Park Com'rs, (1901) 181 U. S. 42.

(9) *Members of Assessing Board Owners of Property.* — In making assessments upon real estate for street improvements, the facts that all the members of the board of trustees were residents of the town and taxpayers therein, and that two members of the board were owners of lots abutting upon the improvement, and assessed therefor at the same rate as the others, do not result in the taking of property without due process of law.

Hibbeh v. Smith, (1903) 191 U. S. 310.

(10) *Discrimination Against Nonresident Owners.* — A state statute, making tax bills levied to pay the contract price for local improvements a lien upon real estate, and providing that if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvements, the improvements shall not be made, which privilege of protest is not given to nonresident owners, is not such a discrimination against the latter as to constitute a deprivation of property without due process of law.

Field v. Barber Asphalt Paving Co., (1904) 194 U. S. 620.

(11) *Validity of Bonds Issued to Pay Cost.* — Township bonds, issued to pay the cost of local improvements, are not invalid though the statute under which they were issued provided for an assessment tax to raise the money to pay the bonds in such a manner as to deprive property owners of property without due process of law. The power to issue bonds, and the mode in which the township should raise the necessary sums to pay the bonds when due, as well as the interest accruing thereon from time to time, are distinct and separable matters. If the Act under which the bonds were issued had not contained any provision whatever for an assessment to raise money to meet them, the township could not repudiate its obligation to pay the bonds.

Loeb v. Columbia Tp., (1900) 179 U. S. 489.

(12) *Imposing Personal Liability.* — A statute authorizing an assessment to be levied upon property for a local improvement, and imposing upon the lot owner, who is a nonresident of the state, a personal liability to pay such assessment, is a statute which the state has no power to enact, and which cannot, therefore, furnish any foundation for a personal claim against such nonresident.

Dewey v. Des Moines, (1899) 173 U. S. 202.

(13) *Estoppel of Petitioners to Set Up Illegality.* — An illegal assessment for a local improvement upon land cannot be set up as a taking of property without due process of law when the work was done and the assessment made at the instance and request of the plaintiffs and other owners, and pursuant to an Act (in form, at least) of the legislature of the state, and in strict compliance with its provisions and with the petition of the landowners; there is an implied contract arising from such facts that the party at whose request and for whose benefit the work has been done will pay for it in the manner pro-

vided for by the Act under which the work was done. "On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the Act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions."

Shepard v. Barron, (1904) 194 U. S. 565.

w. NOTICE AND OPPORTUNITY TO BE HEARD — (1) *In General.* — An opportunity to be heard in proceedings for taxation, upon such notice as is usual in such proceedings, is essential to due process of law.

Pittsburgh, etc., R. Co. v. Backus, (1894) 154 U. S. 421. See also Albany City Nat. Bank v. Maher, (1882) 9 Fed. Rep. 384; Heth v. Radford, (1898) 96 Va. 272. See generally *supra*, *Notice and Opportunity to Be Heard*, p. 440.

An assessment made by a municipal council without notice to, or an opportunity for hearing by, the owners of the property, with the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them opportunity to interpose any defense either to the validity or the amount of the assessment, is wanting in due process of law, even if authorized by statute. *Scott v. Toledo*, (1888) 36 Fed. Rep. 392.

Proceedings before a county auditor, by which an assessment is entered on the general tax duplicate against the taxpayer, whether on failure of the taxpayer to make a return or on making a false return, with a penalty added thereto, without notice or opportunity to be heard, and which assessment is a cloud upon the title of his realty, and a lien upon his property, enforceable by distraint and sale of goods and chattels without suit in court, are not "due process of law." But if merely preliminary, and the collection of the tax cannot be enforced except by suit in court, and of such suit the taxpayer has notice, and all rights to contest the legality of the tax assessed are open to him as a defense in such suit, such proceedings do not deprive the taxpayer of his property without due process of law, for the opportunity to contest the tax, and defend against its legality in the suit brought to enforce payment, with no other remedies to be applied, would give him his "day in court." *Meyers v. Shields*, (1894) 61 Fed. Rep. 721, wherein the court said: "It is not 'due process of law' to enter on the tax duplicate, without notice or trial, what amounts in legal effect to a judgment against the taxpayer, enforceable by distraint and sale of his goods and chattels, and afterwards make it 'due process,' because it may become possible for the taxpayer to

interpose a defense, provided the collecting officer elects to bring a suit to enforce the collection when the more summary remedies have proven unavailing." See also *Brinkerhoff v. Brumfield*, (1899) 94 Fed. Rep. 422.

Notice of action of equalization board. — An assessment by a state board of equalization under a section of the *California* constitution, providing that "the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of roadway laid in such counties, cities and counties, cities, towns, townships, and districts," is without due process of law, there being no provision of law giving to the company notice of the action of the state board, and an opportunity to be heard respecting it. The presentation to the state board by a corporation of a statement of its property and of its value, which it is required to furnish, is not the equivalent to a notice of the assessment made and of an opportunity to be heard thereon. It is a preliminary proceeding, and until the assessment the corporation cannot know whether it will have good cause of complaint. The presentation of the statement can no more supersede the necessity of allowing a subsequent hearing of the owners, than the filing of a complaint in court can dispense with the right of the suitor and his contestant to be there heard. *Railroad Tax Cases*, (1882) 13 Fed. Rep. 750. See also *Sonoma County Tax Case*, (1882) 13 Fed. Rep. 789.

The establishment of a drainage district, involving the levying and assessment of a special tax, without giving the interested party notice and an opportunity to be heard in court, is no deprivation of property without due process of law. *St. Louis Southwestern R. Co. v. Grayson*, (1904) 72 Ark. 119.

The Taxation of Property of Shareholders is not without due process of law when the statute defines the time when the bank shall make its report to the auditor-general, and specifically directs him to hear any stockholder who may desire to be heard.

Merchants', etc., *Bank v. Pennsylvania*, (1897) 167 U. S. 406.

A state statute does not deprive a non-resident stockholder of property without due process of law, because of the omission to require directly the giving of notice of assessments for taxation on his stock, and opportunity for contest by him as to the correctness of the valuation fixed by the taxing officers, but constitutes the corporation the agent of the stockholders, to receive notice and to represent them in proceedings for the correction of an assessment. *Corry v. Baltimore*,

(1905) 196 U. S. 478, in which case the court said: "The possibility that the state taxing officials may abuse their power and fix an arbitrary and unjust valuation of the shares, and that the officers of the corporation may be recreant in the performance of the duty to contest such assessments, does not militate against the existence of the power to require the numerous stockholders of a corporation chartered by the state, particularly those resident without the state, to be represented in 'proceedings before the taxing officials through the agency of the corporation.'"

(2) *In Assessments for Public Improvements* — (a) *In General*. — In making an assessment upon real estate for street improvements, due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned.

Hibben v. Smith, (1903) 191 U. S. 322. See also *Garvin v. Daussman*, (1887) 114 Ind. 429; *Ulman v. Baltimore*, (1890) 72 Md. 587; *Anderson v. Cincinnati*, (1890) 10 Ohio Dec. (Reprint) 794, 23 Cinc. L. Bul. 430.

Opportunity to be heard essential. — Special assessments made by a municipal board when the owner has had no notice of, nor opportunity to be heard in relation to them, are wanting in "due process of law," and may be enjoined. *Murdock v. Cincinnati*, (1889) 39 Fed. Rep. 891.

In a special assessment for public improvements, owners of property are entitled to notice and an opportunity to be heard in respect thereto, in order to give it validity or make the proceeding conform to due process of law. *Scott v. Toledo*, (1888) 36 Fed. Rep. 392.

A section of a city charter giving the city council power to provide means for the improvement of the streets and sidewalks, and to that end to pass by-laws and ordinances assessing the property to be benefited by such improvements "for such amounts as may be fair and reasonable," not to exceed, as against any particular owner, one-fourth of the cost of the entire work fronting his premises, or ten dollars per front foot of his property, and providing that the city court shall have power, upon complaint of the owner as to the assessment of his property, to "correct the errors and supply omissions" therein, and further providing that property shall not be sold for such improvements until the city court in equity shall have so decreed, after an opportunity to the owners to show cause why such a decree should not be entered, does not

deny due process of law. *Montgomery v. Birdsong*, (1899) 126 Ala. 632.

Under certain California statutes every owner of a lot or tract of land liable to be assessed for a street improvement, who, after the first publication of the resolution by the city council of intention to do the work, shall feel aggrieved, or who shall have objections to any of the subsequent proceedings of the council in relation to the performance of the work mentioned in the notice of intention, was authorized to file with the clerk a petition of remonstrance, wherein he was required to state in what respect he should feel aggrieved, or the proceedings to which he objected. Such petition was authorized to be filed at any time after the publication of the notice of intention to do the work, and before the issuance of the assessment; and the council was by the statute required to pass upon the remonstrance, and its decision in respect to the matter was thereby made final and conclusive. The power thus conferred by the statute upon the council included not only the power to correct any and every error committed as against the complaining lot or land owner, but the power to stop and abandon the proceedings, if such action should be deemed necessary for the proper protection of the rights of the complaining party. It was held that the statute afforded a property owner ample opportunity for the correction of any error or injustice done him in the matter of an assessment, by seasonable application to the city council, to which he should have resorted, and, that being so, that a court of equity should afford him no relief. *Brown v. Drain*, (1901) 112 Fed. Rep. 590.

(b) *On Question of Benefits*. — A municipal charter, which provides for the apportionment of the cost of improvements by providing that "each lot or part thereof within the limits of the proposed street improvement abutting upon the street, shall be liable for the full cost of making the improvement upon one-half of the street in front and abutting upon it, and also for the proportionate share of improving the intersections of two streets," does not result

in a deprivation of property without due process of law when the charter gives a hearing on the question of benefits to the property owner before the formation of the district to be improved.

King v. Portland, (1902) 184 U. S. 66, wherein the court said that where a municipal charter gives a hearing on the question of benefits to the property owner before the formation of the district to be improved, and the council takes into consideration whether property would be benefited by improvements in an amount greater than the cost of the improvement as assessed, every requirement of due process of law has been satisfied.

In respect to taxes and assessments, the rule is that a law authorizing the imposition of a tax or assessment upon property according to its value, or to benefits received, does not infringe that provision of the Fourteenth Amendment to the Constitution of the United States which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined, or in subsequent proceedings for its collection. *Brown v. Drain*, (1901) 112 Fed. Rep. 589.

A law providing for street improvements which gives the abutting owners the right to be heard before a tribunal in duty bound to adjust all questioned assessments to the basis of actual special benefits received by the improvements is not invalid as denying due process of law. *Taylor v. Crawfordsville*, (1900) 155 Ind. 403; *Adams v. Shelbyville*, (1900) 154 Ind. 467.

There is a distinction between a tax or assessment which calls for no inquiry nor for anything in the nature of judicial examination before levy and collection, and a tax or assessment imposed upon property according to its value, the special benefits resulting thereto to be ascertained by assessors or other officials upon inquiry or evidence. In the former class of cases it is suggested that, as notice would be of no service to the individual, and no hearing could change the result, as in taxes for licenses and the exercise of franchises, such notice or an opportunity to be heard may be dispensed with; but that in the latter class of taxes and assessments, based upon values or benefits which involve inquiry, notice or an opportunity for hearing is essential, to render the proceeding valid. *Scott v. Toledo*, (1888) 36 Fed. Rep. 392.

A Pennsylvania statute providing for the assessment of the costs of paving against the abutting owner in proportion to frontage, is not in violation of the Fourteenth Amendment in that it contains no provision for judicially ascertaining the special benefits conferred, or for notice to the property owners of the time and place where they can be heard as to the amount of special benefits before the assessment is made. *Harrisburg v. McPherran*, (1900) 14 Pa. Super. Ct. 473, *affirmed* (1901) 200 Pa. St. 343; *Harrisburg v. Funk*, (1900) 14 Pa. Super. Ct. 495, *affirmed* (1901) 200 Pa. St. 348.

Creation of Taxing District by Statute. — If the state constitution does not prohibit, the legislature may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited.

Williams v. Eggleston, (1898) 170 U. S. 311.

(3) *Judicial Proceeding Not Essential.* — In the matter of taxation "due process of law" does not mean by a judicial proceeding. The nation from whom we inherit the phrase "due process of law" has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation.

McMillen v. Anderson, (1877) 95 U. S. 41.

In Assessments for Local Improvements. — A state statute which directs municipalities to assess the whole expense of paving any highway therein upon the lands abutting upon the highway so improved, in proportion to the feet frontage of such lands, without providing for a judicial inquiry into the value of such lands and the benefits actually to accrue to them by the proposed improvement, is not

unconstitutional in the absence of considerations of peculiar and extraordinary hardships amounting to actual confiscation of private property to public use.

Tonawanda v. Lyon, (1901) 181 U. S. 391.

(4) *Opportunity to Be Heard at Some Stage of Proceedings.* — If a taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a quasi-judicial character, or before a tribunal provided by the state for the purpose of determining such questions, due process of law is not denied.

Hodge v. Muscatine County, (1905) 196 U. S. 281.

In matters of taxation, it is sufficient that the party assessed should have an opportunity to be heard, either before a judicial tribunal, or before a board of assessment, at some stage of the proceedings. *Pittsburgh, etc., R. Co. v. Board of Public Works*, (1898) 172 U. S. 45.

A law authorizing the imposition of a tax or assessment upon property according to its value, does not infringe this provision if the owner has an opportunity to question the validity or the amount of it, either before that amount is determined or in subsequent proceedings for its collection. *Winona, etc., Land Co. v. Minnesota*, (1895) 159 U. S. 537.

General laws for the drainage of large tracts of swamp and low lands, upon proceedings instituted by some of the proprietors of the land to compel all to contribute to the expense of their drainage, do not deprive the owners of their property without due process of law, when all persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of

the greater part of the land, and all such persons have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute, and on any error in law or in the principles of assessment. *Wurts v. Hoagland*, (1885) 114 U. S. 614. See also *Hagar v. Reclamation Dist. No. 108*, (1884) 111 U. S. 702.

Opportunity to contest assessments for drainage ditches. — A statute of *Washington* providing for the payment of expenses theretofore incurred in the construction of ditches, is not subject to the objection that it deprives the landowner of property without due process of law, in violation of the Fourteenth Amendment, because no provision is made in the Act in positive terms for contesting the assessments imposed by the county commissioners, since the Act itself provides that in a suit to enforce the lien the property owner might set up any matter respecting the amount or legality of the assessment, and in addition an ample remedy for reviewing the proceedings of the board of commissioners is provided by writ of certiorari, under the general laws of the state. *State v. Henry*, (1902) 28 Wash. 38.

Right to Injunction to Stay Collection Recognized by Statute. — Due process of law is not denied when the statute relating to taxation recognizes the right to an injunction and regulates the proceedings when issued to stay the collection of taxes, and requires the judge granting the injunction to take security of the applicant.

McMillan v. Anderson, 95 U. S. 42, wherein the court said: "It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

Even if notice is not required to be given to a taxpayer before an assessment is made, there is nevertheless due process of law when a statute provides that "courts of com-

mon pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." Ample means are thus provided for a judicial determination of every question touching the validity or legality of the listing or valuation of property, and the levying of taxes thereon, before the taxes are collected. *Oskamp v. Lewis*, (1900) 103 Fed. Rep. 906.

(5) *Mode of Confirming or Contesting Tax.* — The power to tax belongs exclusively to the legislative branch of the government, and when the law pro-

vides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law.

Palmer v. McMahon, (1890) 133 U. S. 689.

(6) *By Board of Revision*. — The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi-judicial* powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value. It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made.

Palmer v. McMahon, (1890) 133 U. S. 689.

Proceedings for reassessment. — A state statute providing that upon complaint that a considerable amount of property had been grossly undervalued by the assessor or other county officials, the governor may appoint a competent person to examine and report, and if he find undervalued property to prepare a list in duplicate showing the character, location, ownership, and valuation, one of which lists shall be filed with the county auditor, for the entry of the list on the assessment

books by the auditor, for the assessment of property at its corresponding value, and for proceedings by the county auditor as under the general law, is not a deprivation of property without due process of law. When opportunity to be heard during the proceedings for the reassessment or any defense of an action for the collection of taxes is given, it is not necessary that there shall be a hearing before the governor can act upon the complaint. *Weyerhaeuser v. Minnesota*, (1900) 176 U. S. 554.

(7) *Sufficiency of Notice* — (a) *In General*. — The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law, when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them.

Bell's Gap R. Co. v. Pennsylvania, (1890) 134 U. S. 239.

"Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. * * * But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary." *Turpin v. Lemon*, (1902) 187 U. S. 57.

"Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard,

whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment to the Constitution." *Leigh v. Green*, (1904) 193 U. S. 92.

The assessment for taxation of railroad properties by railroad commissioners is not a denial of due process of law. *Owensboro, etc., R. Co. v. Daviess County*, (Ky. 1887) 3 S. W. Rep. 164; *Clark County Ct. v. E., etc., R. Co.*, (1886) 7 Ky. L. Rep. 761.

A private sale of lands for taxes without notice to the owner other than the original notice of the public sale and the forfeiture following the offer at public sale, does not deny the owner due process of law. *Newton v. Roper*, (1898) 160 Ind. 630.

Ten days' notice to pay license. — A statute does not deny "due process of law" which enacts that when any person shall fail or refuse to pay his license tax, the collector shall give ten days' written or printed notice to the delinquent requiring its payment; and the manner of giving this notice is fully prescribed. If at the expiration of this time the license "be not fully paid, the tax collector may, without judicial formality, proceed to seize and sell, after ten days' advertisement, the property" of the delinquent, or so much

as may be necessary to pay the tax and costs. *McMillen v. Anderson*, (1877) 95 U. S. 41.

Proceedings in organization of irrigation district.—The fact that a section of a statute, authorizing the organization of irrigating districts and the sale of bonds therefor, makes provision for testing the legality of proceedings had thereunder by permitting the institution of a special proceeding by the board of directors of the irrigation district, without the requirement of personal service upon the property owners affected, would have no bear-

ing upon the question whether the proceedings had for the organization of the district, or the issuance of bonds, were without due process of law, as secured by the Federal Constitution, but that objection would apply only to the judgment rendered in the special proceedings, and would not thereby affect the constitutionality of the whole Act. *Kinkade v. Witherop*, (1902) 29 Wash. 10.

The Fourteenth Amendment is inapplicable to tax proceeding cases. *German Sav., etc., Soc. v. Ramish*, (1902) 138 Cal. 120.

(b) **In Assessments for Public Improvements.**—Due process of law does not require notice in the assessment of poll taxes, license taxes, and general specific taxes on things or persons or occupations. So, also, if taxes are imposed in the shape of licenses for privileges such as those on foreign corporations for doing business in a state, or on domestic corporations for franchises, there is no necessity for notice or hearing. But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in; the law in prescribing the time when complaints respecting the justice of the assessment will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may follow, if the tax be not paid, by the sale of the delinquent property, is due process of law.

Hagar v. Reclamation Dist. No. 108, (1884) 111 U. S. 709, *affirming* *Reclamation Dist. No. 108 v. Hagar*, (1880) 4 Fed. Rep. 366.

Notwithstanding the doubt arising from the lack of express provision for notice in an ordinance providing for the construction of a sewer, the court said that it could not be held, in view of the notice which was given, of the construction placed upon this ordinance by the council thereafter, and of the approval by the Supreme Court of the proceedings as in conformity to the laws of the state, that the provisions of the Federal Constitution, requiring due process of law, had been violated. *Paulsen v. Portland*, (1893) 149 U. S. 42, wherein the court said: "While not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter is its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limita-

tions imposed by constitutional provisions, and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council." *Affirming* (1888) 16 Oregon 450.

The interest of neighboring property owners, who may possibly thereafter be assessed for the benefit to their property accruing from opening a street, is too remote and indeterminate to require notice to them of the taking of lands for such improvement, in which they have no direct interest. *Goodrich v. Detroit*, (1902) 184 U. S. 437.

When notice not required.—In making an assessment on property for improvement, it has not been made without "due process of law" for failing to give notice of the assessment when the statute provides that the city council may not act except upon the petition of the majority of the property holders or the recommendation of the board of health; it acts only by ordinance, and the contract can only be let on advertisement; and the tax is levied upon the property in the district according to the area, ignoring all improvements upon it, and not according to the value of the property. As the apportionment of the taxation is a mere mathematical calculation, it is one of those things as to which no notice can be made because no notice can be of value. *Gillette v. Denver*, (1884) 21 Fed. Rep. 823.

(c) **Notice by Statute.**—Proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and due process of law, as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments

of judicial tribunals. Notice by statute is generally the only notice given, and that is sufficient.

Kentucky R. Tax Cases, (1885) 115 U. S. 331.

Notice of some kind in tax proceedings is necessary to due process. It need not be a personal citation, but is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. Generally only a statutory notice is given, and the state may designate the kind of notice and the manner in which it shall be given, which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain. *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 410, *affirmed* on other grounds (1886) 118 U. S. 394.

Due process of law in a tax proceeding is deemed to be pursued, when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at the time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient, if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. *Railroad Tax Cases*, (1882) 13 Fed. Rep. 752.

Naming the Time and Place for the Meeting of an Assessing Board by Statute is sufficient in tax proceedings; personal notice is unnecessary.

Pittsburgh, etc., *R. Co. v. Backus*, (1894) 154 U. S. 436, *affirming* (1892) 133 Ind. 625. See also *Cleveland, etc., R. Co. v. Backus*, (1892) 133 Ind. 513.

A notice to all property holders of the time at which an assessment is to be made is all that due process requires in respect to the matter of notice in a tax proceeding. *Mer-*

Notice of meeting of board of equalization unnecessary.—Where the time of the meeting of a board for the equalization of taxes is fixed by statute, all persons must take notice of such time; and the action of the board of equalization, in raising the assessed value of the property of an individual above the return made to the board by the assessor, does not require that notice shall be given to the taxpayer, to make such action valid; and the want of notice to an individual taxpayer is not in violation of Article XIV. of the amendments of the Constitution of the United States, which forbids the deprivation of any person of life, liberty, or property without due process of law. *Streight v. Durham*, (1900) 10 Okla. 361.

Statute fixes amount of tax on market value.—In an assessment for taxation against national banks, where the assessor performs no judicial act, but the assessment made by him is upon the market value of the stock as reported to him by the bank, and the Act fixes the amount of the tax, further notice to the taxpayer of the assessment is not required. *People's Nat. Bank v. Marye*, (1901) 107 Fed. Rep. 580.

Imposing tax on levee district.—A *Mississippi* statute imposing a specific tax of ten cents per acre on all the lands within a levee district created by the Act, and making the Act notice to all persons owning the land, or being interested therein, to come forward and pay the tax by the day fixed, or the same would be liable to sale by the sheriff and tax collector of the county in which the land is situated, was held to be constitutional. *Rouse v. Hampton*, (1871) 20 Fed. Cas. No. 12,088, *reversed* on other grounds *Hampton v. Rouse*, (1874) 22 Wall. (U. S.) 263.

chants', etc., *Bank v. Pennsylvania*, (1897) 167 U. S. 466.

A statute which provides for the manner in which assessments for taxation are to be made, stating the time and place and providing for a public hearing, is a compliance with this amendment. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. Rep. 633.

A State Statute Organizing Five Towns into a Single Municipal Corporation for the purpose of apportioning among them the expense of erecting and maintaining a bridge over a highway, does not deprive the citizens of property without a hearing from the towns, for their representatives were in the legislature and took part in the proceedings by which the Act was passed.

Williams v. Eggleston, (1898) 170 U. S. 310.

(d) By Publication or Posted Notices.—The owner of real estate, who is a non-resident of the state within which the property lies, cannot evade the duties and

obligations which the law imposes upon him in regard to such property, by his absence from the state. Because he cannot be reached by some process of the courts of the state, which, of course, have no efficacy beyond their own borders, he cannot therefore hold his property exempt from the liabilities, duties, and obligations which the state has a right to impose upon such property; and in such cases some substituted form of notice has always been held to be a sufficient warning to the owner of the proceedings which are being taken under the authority of the state to subject his property to those demands and obligations. Otherwise the burden of taxation, and the liability of such property to be taken under the power of eminent domain, would be useless in regard to a very large amount of property in every state of the Union.

Huling v. Kaw Valley R., etc., Co., (1889) 130 U. S. 563.

Notice by publication and opportunity to appear and to be heard is due process in proceedings to assess and collect taxes. *Campbellsville Lumber Co. v. Hubbert*, (C. C. A. 1902) 112 Fed. Rep. 721, *affirmed* (1903) 191 U. S. 70.

A statute which provides that in proceedings to enforce the collection of taxes on lands owned by nonresidents of the county in which they are situate, or in the case of nonresidents of the state, notice of the pendency of the suit shall be given by a publication weekly for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of said lands, in some newspaper published in the county where such suit may be pending; and that such suit shall stand for trial at the first term of the court after the complaint may be filed, if said four weeks, in the case of a nonresident or unknown defendant as aforesaid, shall expire

either before the first day of the term or during the term of court to which said suits are brought respectively, unless a continuance is granted for good cause shown within the discretion of the court, gives a reasonable notice of the pendency of the suit. *Johnson v. Hunter*, (1904) 127 Fed. Rep. 222.

Formation of reclamation district.—An *Arkansas* statute providing that upon the presentation of a petition setting forth a description of the lands of which it is desired to have a reclamation district formed, and the names of the owners, notice of the hearing shall be given by publication, but providing that after the formation of the district no further notice need be given, but that proceedings are to be had for the election of officers, the making of by-laws, the estimate of works and their cost, and the making of assessments, without time or place for opposition to be made, does not deny due process of law. *Reclamation Dist. No. 108 v. Hagar*, (1884) 66 Cal. 54.

By Posting in Public Places.—A state statute requires that all personal estate, within or without the commonwealth, shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such person resides, if within the commonwealth, and if he resides out of the commonwealth shall be assessed in the place where the trustee resides. Before making the assessment the assessors shall give notice by posting in some public place or places, that in case the taxpayer shall fail to make return they shall ascertain as nearly as possible the particulars of the estate and estimate its just value, which shall be conclusive upon the owner, unless he can show a reasonable excuse for omitting to make his return. Provision is also made for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax. Such proceedings are amply sufficient to constitute due process of law.

Glidden v. Harrington, (1903) 189 U. S. 258, wherein the court said that proceedings for the collection of taxes on personal property "should be construed with the utmost liberality, and while a notice may be required at some stage of the proceedings such notice need not be personal, but may be given by

publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive, or unjust that they are declared to be not due process of law."

Assessments for Draining Swamp Lands. — Proceedings under a state statute providing for the assessment of certain real estate for draining swamp lands, and requiring, before the assessment could be collected or become effectual, that the tableau of assessments should be filed in the proper District Court of the state, that personal service of notice with reasonable time to object should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown and could not be found, did not deprive the owners of real estate assessed of property without due process of law.

Davidson v. New Orleans, (1877) 96 U. S. 105. See also *Kentucky R. Tax Cases*, (1885) 115 U. S. 330; *Fallbrook Irrigation Dist. v. Bradley*, (1896) 164 U. S. 157.

(e) **Notice of Decision with Right of Appeal.** — Even if no previous notice of a hearing before a board of public works in the matter of assessment for taxation is required by the statute, or has been in fact given to a corporation, yet the notice of its decision, with the right to appeal therefrom to the Circuit Court of the county, and there to be heard and to offer evidence, before the valuation of its property for taxation becomes finally fixed, affords the corporation all the notice to which it is entitled.

Pittsburgh, etc., R. Co. v. Board of Public Works, (1898) 172 U. S. 45.

(f) **Reasonable Notice of Reassessment.** — Only in a clear case will a notice of reassessment for taxation authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.

Bellingham Bay, etc., R. Co. v. New Whatcom, (1899) 172 U. S. 318, wherein the court said: "The purpose of notice [of a reassessment of property for taxation] is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made

only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard. And the time and place must be such that with reasonable effort he will be enabled to attend and present his objections."

58. Sundry Matters Affecting Life, Liberty, or Property — *a. ESTABLISHMENT OF SPECIAL SCHOOL DISTRICT.* — The establishment of a special school district and taxation within the district for the support of the school is not a taking of property without due process of law in violation of the Fourteenth Amendment. "It has been repeatedly held both by the federal and state courts that political subdivisions may be clothed by the legislature of the state with power of taxation for certain specified purposes and within certain specified limits."

Martin v. School Dist., (1900) 57 S. Car. 125.

b. PROHIBITING ESTABLISHMENT OF HOSPITALS, ETC., IN CERTAIN CITY DISTRICTS. — A state statute for the protection of the public health, which prohibits the establishment or maintenance of additional hospitals, pest houses, and burial grounds in the "built-up portions of cities," is not repugnant to the Fourteenth Amendment of the Constitution of the United States relating to the protection of property.

Com. v. Charity Hospital, (1901) 198 Pa. St. 270.

c. JUDGMENT OF ULTRA VIRES IN FAVOR OF COUNTY. — When a county has entered into a contract which was beyond its power, and in an action on the contract a judgment has been rendered in the state court in favor of the county on a defense of *ultra vires*, the county has no such vested property right in the judgment as is impaired by a subsequent statute retroactively legalizing the contract.

Steele County v. Erskine, (C. C. A. 1899) 98 Fed. Rep. 215, *affirming* (1898) 87 Fed. Rep. 630.

d. REGULATING ANNEXATION OF TERRITORY TO MUNICIPAL CORPORATION. — A statute providing for the annexation of territory to a city by the common council and granting the right of appeal from the action of the council to resident freeholders only, is not a grant to any citizen or class of citizens of privileges or immunities which upon the same terms do not belong equally to all citizens, and is not in violation of the Fourteenth Amendment as denying due process of law.

Taggart v. Claypool, (1896) 145 Ind. 590.

e. COUNTY PRINTING. — A statute requiring notices of the rates of taxation and abstract of the valuation of property, and levies of taxes for various purposes in the several towns and townships of each county in the state, to be published in newspapers issued at the county seat, is not in violation of the Fourteenth Amendment of the Federal Constitution as depriving the owners of papers published outside the county seat from competing for public printing, and so depriving them of their property without due process of law.

State v. Defiance County, (1894) 1 Ohio Dec. 584.

f. DISPOSITION OF PUBLIC FUNDS. — An Act placing funds to the credit of a board of health, and directing that such funds be taken from any other moneys in the city treasury and replaced by a loan to be repaid from moneys collected from the liquor taxes, does not deprive any one of property without due process of law, the fund being absolutely under the control of the legislature.

Davock v. Moore, (1895) 105 Mich. 120.

g. PROHIBITING TRANSPORTATION OF COTTON SEED BY NIGHT. — A statute declaring "that it shall not be lawful for any person to transport or move after sunset," and before sunrise of the succeeding day, within the specified localities, "any cotton in the seed" does not deprive an owner of his property without due process of law.

Davis v. State, (1880) 68 Ala. 58, in which case the court said: "It does not inhibit all transportation, but seeks only to regulate and control it, in one particular condition of a commodity. We regard this as a mere police regulation, the alleged impolicy or injustice of which is beyond the legitimate scope of judicial criticism. The primary object of this law is not to interfere with the right of property or its vendible character. Its object is

to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits to the public detriment, at least within the specified territory. This the legislature had the power to do."

h. PROHIBITING RECEIPT OF DUES BY INSOLVENT ASSOCIATION. — A statute making it a felony for any officer of a building and loan association to receive

any money or thing of value in payment of any dues or fees due the association after knowledge that the association is insolvent or in failing circumstances, and making the insolvency of the association *prima facie* evidence of knowledge of insolvency, does not deprive stockholders who became borrowers prior to the statute of the right to pay their premiums nor of their property, without due process of law.

State v. Missouri Guarantee Sav., etc., Assoc., (1902) 167 Mo. 489.

i. PROHIBITING ACCEPTING DEPOSIT BY INSOLVENT BANK. — A statute which forbids a banker, being insolvent, from taking a deposit on the pretense of solvency, and punishing a violation as for an embezzlement, does not deprive him of any liberty or property right guaranteed by the National Constitution.

Dreyer v. Pease, (1898) 88 Fed. Rep. 980.

j. MECHANICS' LIEN LAW. — A mechanics' lien law is not unconstitutional as depriving a landowner of property without due process of law.

Barrett v. Millikan, (1901) 156 Ind. 510.

k. REQUIRING REGISTRATION OF TITLE. — A declaration of a state constitution that "no claim of title or right to land which issued prior to the thirteenth day of November, 1835, * * * shall ever hereafter * * * be used as evidence in any of the courts of this state," unless it had been archived in the general land office or recorded in the county in which the land was situated at the time of record, is in conflict with the due process of law clause of the Federal Constitution.

Texas-Mexican R. Co. v. Locke, (1889) 74 Tex. 370.

l. FENCING GRAZING LANDS. — The complainant was the owner of about eight thousand acres of land in one body, which was valuable for grazing purposes, but beyond this had little value. He derived an income therefrom from a *per capita* royalty paid by owners of cattle placed in this pasture. When he purchased this property the law of the state required all owners of cattle and stock to keep them fenced in, and, in case they strayed on the lands of others, gave to the owners of such lands the right of distraining and impounding them. No proprietor was required to fence his land used for any purpose but pasture, and the provisions of the law protected him from trespass. The general assembly passed an Act to exempt certain territory in the same county from the operation of this law. Under the provisions of the Act some thirty-two thousand acres, in which territory was embraced this land of the complainant, were exempted from the provisions of the general law. The complainant was thus compelled either to build a substantial fence around his whole tract, of a character to keep out cattle, hogs, or other stock, or his land could be grazed upon by the cattle and stock of any person who chose to turn them out. The defendants were cattle and stock owners, neighbors of the lands of the complainant, and, anterior to the passage of the Act in question, had used the privilege of grazing on the lands of the complainant and had paid the *per capita* royalty charged therefor; after the passage of the Act their stock and cattle had been at large

and had constantly trespassed upon the lands of the complainant. It was held that the statute deprived the complainant of his property without due process of law.

Smith v. Bivens, (1893) 56 Fed. Rep. 353.

m. CONSTRUCTION OF DRAINS ON LANDS OF OTHERS. — A constitutional provision declaring that "general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof necessary drains, ditches, and dikes upon the lands of others under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes," does not conflict with the Fourteenth Amendment of the Federal Constitution.

Matter of Tuthill, (1899) 36 N. Y. App. Div. 492, *affirmed* (1900) 163 N. Y. 133.

n. FORFEITURE OF LANDS FOR NONTENANTRY. — A state constitution providing for the forfeiture of lands for nontenantry thereof for five successive years does not violate the due process of law clause of the Fourteenth Amendment.

State v. Swann, (1899) 46 W. Va. 128.

o. STATUTORY COMPENSATION FOR LOGS DRIFTED ON SHORE. — A statute providing that "all persons claiming logs cast by wind and tide upon any shore bordering upon the Chesapeake bay and its tributaries are hereby prohibited from removing the same without the payment to the owner of the said shore of the sum of twenty-five cents for each log so removed," and providing for proceedings to enable the landowner to sell the logs for the payment of the charges, after notice by publication, without any judicial determination of the amount payable, does not deprive the owners of the logs of property without due process of law.

Henry v. Roberts, (1892) 50 Fed. Rep. 903.

p. HEIGHT OF BILLBOARDS. — A municipal ordinance which declares "that it shall be unlawful for any person, firm, or corporation to erect, build, construct, or maintain in the city of Los Angeles any fence, building, or other structure of or to a greater height than six feet from the surface of a sidewalk, street, or the ground where the same is erected, built, constructed, or maintained, for the purpose of painting thereon any sign or advertisement for advertising purposes or posting thereon or affixing or attaching thereto or thereon any bills or signs, placards, cards, posters, or other advertising matter for advertising purposes," cannot be declared invalid.

In re Wilshire, (1900) 103 Fed. Rep. 624, wherein the court said: "It must be admitted that the limit prescribed approaches very closely, if it does not reach, the point of unreasonableness. But between the line above which the height prescribed would be obviously reasonable and below which it

would be obviously unreasonable there is a range concerning which reasonable and fair-minded men may well differ. The action of the municipal authorities, exercised within that range, ought not, in my opinion, to be interfered with by the courts."

q. VALIDATING BONDS. — A statute providing that when a bond is taken in a court of record it may be done in open court, and when so taken need not

be signed by the persons entering into the same, does not deprive the obligors of their property without due process of law.

McNamara v. People, (1899) 183 Ill. 164.

r. RECOVERY BY GUARDIAN OF PROPERTY BELONGING TO NONRESIDENT. —

A statute providing, "in all cases where any guardian and his ward may both be nonresidents of this state and such ward may be entitled to property of any description in this state, such guardian, on producing satisfactory proof to the probate court of the proper town and county, by certificates duly authenticated according to the Act of Congress in such cases, that he has given bond and security in the state in which he and his ward reside in double the amount of the value of the property, as guardian, and it is found that a removal of the property will not conflict with the terms of limitation attending the right by which the ward owns the same, then any guardian may demand or sue for and remove any such property to the place of residence of himself and ward," does not deprive the ward of his property without due process of law in violation of the Fourteenth Amendment.

Mitchell v. Peoples Sav. Bank, (1898) 20 R. I. 500.

s. REGULATING THE TAKING OF ICE.

The right to take ice from public waters within a state being a possession of all the people thereof, a law which exacted from any individual a sum of money as a consideration for the enjoyment of such waters, upon the

theory that the state is the owner of the waters, violates the Fourteenth Amendment prohibiting any invasion of the right to liberty and property without due process of law. *Rossmiller v. State*, (1902) 114 Wis. 169.

t. SUMMARY SALE OF PROPERTY OF TRESPASSERS. — An Act authorizing the land agent, or those acting under him, to seize and sell without legal process the teams, supplies, and property of supposed trespassers upon the public lands engaged in cutting and hauling away timber, denies such persons due process of law and is void.

Dunn v. Burleigh, (1873) 62 Me. 24.

u. SUMMARY SALE OF IMPOUNDED ANIMALS. — A statute authorizing the detention of animals running at large and the summary sale of such animals, after ten days' advertisement, in default of the payment of damages and the costs of keeping the same, is a deprivation of property without due process of law in that the sale is permitted without any judicial proceeding to determine the amount of the damages, and whether or not the animal was in fact running at large within the meaning of the Act.

Greer v. Downey, (Ariz. 1903) 71 Pac. Rep. 900.

v. CONFERRING JURISDICTION OVER NONRESIDENTS SUING IN DOMESTIC COURTS. — A statute providing that a nonresident on whom service of process cannot be had, who brings an action in the domestic courts, shall be held to answer any action brought against him by the defendant if the demands can be set off against each other, does not deny the nonresident due process of law.

Aldrich v. Blatchford, (1900) 175 Mass. 369.

w. WRIT OF ATTACHMENT ON FAILURE TO PAY ALIMONY. — A decree of alimony, not being, under the state decisions, a moneyed decree, but a decree to enforce the performance of a duty, the nonperformance of which is wrong and *quasi-criminal*, a writ of attachment under a state law is an appropriate mode of enforcing such decree, and does not deprive the defendant of due process of law.

Ex p. Murray, (1888) 35 Fed. Rep. 496.

x. ACTION BY PARENT FOR INJURY TO MINOR CHILD. — A statute authorizing a father to maintain in his own name an action for an injury to his minor child does not deprive the defendant of his property without due process of law in violation of the Fourteenth Amendment, since the judgment rendered is a bar to further action. Nor does such a statute deprive the child of his property.

Lathrop v. Schutte, (1895) 61 Minn. 196.

y. FORCIBLE ABDUCTION IN EXTRADITION. — In case of extradition, due process of law is limited to the process of the state which deprives the party of his liberty, and does not include the means by which others brought him into the state, so that one brought into the state by force and held under a warrant duly issued is not deprived of liberty without due process of law.

In re Mahon, (1888) 34 Fed. Rep. 530.

z. REMOVAL OF TRUSTEE BY APPOINTMENT OF ANOTHER. — The appointment of a person to administer a trust which another who had been appointed trustee by a will declined by his conduct to accept, does not deprive the latter of his rights as guaranteed by this amendment.

Adams v. Adams, (1886) 64 N. H. 224.

a1. REGULATION AND LICENSE OF EMPLOYMENT AGENCIES. — Requiring an employment agency to pay a license fee of two hundred dollars and give a bond for one thousand dollars, does not deprive such agency of liberty or property without due process of law.

Price v. People, (1901) 193 Ill. 114.

b1. COLLECTION OF PENALTY BY SUMMARY PROCESS. — A statute fixing a penalty for a violation of law, and authorizing the sheriff or state revenue agent to assess and collect such penalty by distress, is unconstitutional as a taking of property without due process of law.

McBride v. State Revenue Agent, (1893) 70 Miss. 716.

X. WHO MAY INVOKE CONSTITUTIONAL RIGHT — 1. In General. — The constitutionality of a statute cannot be assailed without showing that the party questioning it has been or is likely to be deprived of his property without due process of law; a court cannot assume to decide the general question whether the statute as to some other person amounts to a deprivation of property.

Tyler v. Judges, (1900) 179 U. S. 410.

A party has no interest to assert that a statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of a constitutional right. *Castillo v. McConnico*, (1898) 168 U. S. 680.

To constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived. *New Orleans v. New Orleans Water Works Co.*, (1891) 142 U. S. 88.

2. Waiver of Unconstitutionality.—A property owner who signs a petition for a street pavement under a charter which requires the cost to be apportioned among the abutting owners according to frontage, necessarily asks that the work be done under the statutory rule, and thereby waives any right to object to it on the ground that it constitutes a taking of property without due process of law.

Conde v. Schenectady, (1900) 184 N. Y. 258.

One who petitioned a municipal board for a street improvement, and for the whole cost to be assessed in instalments, and who, "in consideration of the city's making said improvement," with each of the signers of said petitions, agreed with the other signers and with said city, and jointly and severally bound

himself, to make good to the city any deficiency in the collectibility of the assessment, caused by insufficiency of values of property of those not signing the petitions, was held to have waived notice of the plan of assessments, and could not afterwards impeach the proceedings, and have them declared void for want of notice or an opportunity to be heard. *Murdock v. Cincinnati*, (1891) 44 Fed. Rep. 727.

AMENDMENT XIV., SECTION 1.

"Nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

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I. PROHIBITION ON STATE ACTION. — That this amendment is a prohibition on all state agencies, whether legislative, judicial, or executive, and is not directed against the action of individuals, see under the clause of this section relating to the privileges and immunities of citizens, *supra*, p. 393.

II. CONSTRUCTION BY STATE COURTS OF STATUTES AND ORDINANCES. — The Supreme Court of the United States is not precluded by the opinion of a state court from putting upon municipal ordinances an independent construction; for the determination of the question whether proceedings under such ordinances, and in enforcement of them, are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which for that purpose the Federal Supreme Court is required to ascertain and adjudge.

Yick Wo v. Hopkins, (1886) 118 U. S. 366.

Powers of state courts. — It seems that while, since the Fourteenth Amendment of the Federal Constitution prohibits the deprivation of property without due process of law, the United States Supreme Court has jurisdiction to review the decision of the state court sustaining a state statute which is

claimed to be in violation of said provision, a decision of the federal court sustaining a state statute is not *res adjudicata* and binding upon a state court when the same question arises under a similar statute. It is still the duty of the state court to decide it according to its interpretation of the constitutional guaranty. *People v. Budd*, (1889) 117 N. Y. 1.

III. "ANY PERSON" — 1. In General. — This amendment is not confined to the protection of citizens. These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race or color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, (1886) 118 U. S. 369. See also *Templar v. State Board of Examiners*, (1902) 131 Mich. 256; *State v. Dering*, (1893) 84 Wis. 585.

The provision of Const. U. S., Amendment 14, sec. 1, declaring that no state shall "deny

to any person, within its jurisdiction the equal protection of the laws," secures to every person within the jurisdiction of a state, though not a citizen or even a resident, the protection of its laws equally with its own citizens, and entitles him to the same remedies. *Steed v. Harvey*, (1898) 18 Utah 367.

2. Not Limited to Protection of Colored Race. — While the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, it is not restricted to that purpose, but relates also to discriminations in matters entirely outside of the political relations of the parties aggrieved.

Holden v. Hardy, (1898) 169 U. S. 382. See also *Maxwell v. Dow*, (1900) 176 U. S. 593; *Strauder v. West Virginia*, (1879) 100 U. S. 306.

The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their

freedom. But this in no respect limited its operation. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the states throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. *Santa Clara County v.*

Southern Pac. R. Co., (1883) 18 Fed. Rep. 397, *affirmed on other grounds* (1886) 118 U. S. 394.

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on ac-

count of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." *Slaughter-House Cases*, (1872) 16 Wall. (U. S.) 81.

3. Corporations as Persons.—That corporations are persons within the meaning of this clause and the clause providing "nor shall any state deprive any person of life, liberty, or property, without due process of law," see under that clause, *Corporations as Persons*, *supra*, p. 423.

4. Resident Aliens.—Residents, alien born, are entitled to the equal protection of the laws.

U. S. v. Lee Huen, (1902) 118 Fed. Rep. 455. See also *Fraser v. McConway, etc., Co.*, (1897) 82 Fed. Rep. 257; *State v. Montgomery*, (1900) 94 Me. 192.

Discrimination against alien peddlers.—A statutory provision which, in regulating hawking and peddling, discriminates between citizens and aliens, violates the constitutional provision. *State v. Montgomery*, (1900) 94 Me. 192.

Discrimination against alien barbers.—A *Michigan* statute concerning the licensing of barbers which provides for the examination of an applicant concerning his ability to prepare and fit for use tools and utensils used by barbers, including the proper antiseptic treatment of razors, etc., and the nature and effect of eruptive and other diseases of the skin and scalp, and whether the same are infectious or communicable, and provides that no

person so examined shall receive a certificate of the said board unless he shall appear to be skilled in the use of barbers' tools, and possessed of knowledge sufficient to prevent the spread, by means of barbers' tools and appliances, of eruptive and other diseases of the skin and scalp, and further provides that no person so examined shall receive such certificate who at the time of such examination is an alien, was held to be unconstitutional. *Templar v. State Board of Examiners*, (1902) 131 Mich. 257.

Foreign miners' license.—A state has the authority to require the payment of a license fee by foreigners for the privilege of working the gold mines in the state, and an Act prohibiting foreigners from working the gold mines except on condition of paying a certain sum each month for the privilege is not unconstitutional. *People v. Naglee*, (1850) 1 Cal. 232.

IV. THE EQUAL PROTECTION OF THE LAWS—1. As Dependent upon Rights Enjoyed under State Laws.—What must constitute a denial of the equal protection of the law will depend in a large measure upon what rights have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, each case must, to an extent, depend upon its own facts. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty.

Nashville, etc., R. Co. v. Taylor, (1898) 86 Fed. Rep. 185.

2. Inequality in Actual Results.—This constitutional provision does not invalidate legislation on the mere ground of inequality in actual result.

Cotting v. Kansas City Stock Yards Co., (1901) 183 U. S. 110, *reversing* (1897) 79 Fed. Rep. 679, 82 Fed. Rep. 839, 82 Fed. Rep. 850.

3. Direct and Consequential Injuries to Property.—There has been no denial of the equal protection of the laws when the Supreme Court of a state has distinguished, as to the right to recover for injuries to property from the

construction of a railway, between those who were shut off from access to and use of the street by the construction thereon of the railroad and those who suffered, not from the construction of the railroad on the street on which their property abutted, but from the injuries consequential on the operation of the railroad.

Marchant v. Pennsylvania R. Co., (1894) 153 U. S. 389.

4. As Affected by State Action — a. POWER TO CLASSIFY SUBJECTS OF LEGISLATION — (1) *In General.* — It is not the purpose of this amendment to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.

Field v. Barber Asphalt Paving Co., (1904) 104 U. S. 621.

The rule requiring the equal protection of the laws is not a substitute for municipal laws; it only prescribes that they have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. *Magoun v. Illinois Trust, etc., Bank*, (1898) 170 U. S. 293.

It is the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public. *Atchison, etc., R. Co. v. Matthews*, (1899) 174 U. S. 106.

Classification by legislation is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. *Orient Ins. Co. v. Daggs*, (1899) 172 U. S. 562, *affirming Daggs v. Orient Ins. Co.*, (1896) 136 Mo. 382.

(2) *Applicable to All Persons Similarly Situated.* — The right to the equal protection of the laws is not denied when it is apparent that the same law or course of procedure is applicable to any other person in the state under similar circumstances and conditions.

Tinsley v. Anderson, (1898) 171 U. S. 106.

This clause simply requires that state legislation shall treat alike all persons brought under subjection to it. *Minneapolis, etc., R. Co. v. Beckwith*, (1889) 129 U. S. 29.

A classification to be obnoxious must be arbitrary and destitute of reasonable basis. *Fidelity Mut. L. Assoc. v. Mettler*, (1902) 185 U. S. 325.

When legislation applies to particular bodies or associations imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions. *Missouri Pac. R. Co. v. Mackey*, (1888) 127 U. S. 209.

For the government and regulation of railroads it is competent for the legislature to enact laws, and the same cannot be rendered invalid because of their nonapplicability to other and dissimilar properties, but the legislature cannot enact statutes applicable as well to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. *Louisville, etc., R. Co. v. Railroad Commission*, (1884) 19 Fed. Rep. 694.

Whenever a law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied. *Walston v. Nevin*, (1888) 128 U. S. 582, *affirming* (1887) 86 Ky. 492.

(3) *Individuals Not to Be Subject to Discriminating Legislation.* — The equal protection of the laws is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Duncan v. Missouri, (1894) 152 U. S. 382.

By "equal protection of the laws" is meant equal security under them to every one, under similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of

each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are equally imposed upon all others under like

circumstances." *In re Grice*, (1897) 79 Fed. Rep. 645, *reversed* in *Baker v. Grice*, (1898) 169 U. S. 284, on the ground that no such urgency was shown as to justify a federal court releasing on habeas corpus a person held on process of a state court, and that the petitioner should be left to the regular course of justice in the state court and the remedy by writ of error from the United States Supreme Court.

"The equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other indi-

vidual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed." *Atchison, etc., R. Co. v. Matthews*, (1899) 174 U. S. 104.

The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. *McPherson v. Blacker*, (1892) 146 U. S. 39, *affirming* (1892) 92 Mich. 377.

(4) *Must Bear Some Relation to Purpose of Statute.* — An objection that a state statute denies to a party the equal protection of the law can only be sustained if the statute treat the party differently from what it does others who are in the same situation as he; that is, in the same relation to the purpose of the statute.

Ohio v. Dollison, (1904) 194 U. S. 447.

The equal protection of the law does not forbid classification. The power of classification is upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. *Atchison, etc., R. Co. v. Matthews*, (1899) 174 U. S. 103.

Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be arbitrary and without such basis. *Gulf, etc., R. Co. v. Ellis*, (1897) 165 U. S. 154.

b. LAW UNFAIRLY ADMINISTERED. — In determining whether municipal ordinances deny the equal protection of the laws, the courts are not obliged to reason from the probable to the actual, and pass upon their validity as tried merely by the opportunities which their terms afford, of equal and unjust discrimination in their administration. When the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States, though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo v. Hopkins, (1886) 118 U. S. 373. See also *Jew Ho v. Williamson*, (1900) 103 Fed. Rep. 10. And see *Statutes and Ordi-*

nances Directed Against Chinese — Mode of Enforcing Unobjectionable Ordinance, infra, p. 567.

c. **BURDENING RIGHT TO CHALLENGE VALIDITY OF STATUTE.** — When the legislature, in an effort to prevent any inquiry into the validity of a particular statute, so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws.

Cotting v. Kansas City Stock Yards Co., (1901) 183 U. S. 102, *reversing* (1897) 79 Fed. Rep. 679, 82 Fed. Rep. 839, 850.

d. **EXERCISE OF POLICE POWER** — (1) *In General.* — The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.

Connolly v. Union Sewer Pipe Co., (1902) 184 U. S. 556, *affirming* *Union Sewer-Pipe Co. v. Connolly*, (1900) 99 Fed. Rep. 354. See also *Davis v. Massachusetts*, (1897) 167 U. S. 47; *New York, etc., R. Co. v. Bristol*, (1894) 151 U. S. 567; *Cantini v. Tillman*, (1893) 54 Fed. Rep. 974; *Ex p. Smith*, (1869) 38 Cal. 702; *Parks v. State*, (1902) 159 Ind. 211; *State v. Bohemier*, (1902) 96 Me. 257; *Com. v. Abrahams*, (1892) 156 Mass. 57.

A state statute enacted for the protection of health and for the prevention of fraud is not inconsistent with this amendment. *Powell v. Pennsylvania*, (1888) 127 U. S. 683.

From the very necessities of society, legislation of a special character having these objects in view must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment. *Barbier v. Connolly*, (1885) 113 U. S. 31.

This clause does undoubtedly prohibit discriminating and partial legislation by any state, in favor of particular persons as against others in like condition. Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but

equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease, and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. *Minneapolis, etc., R. Co. v. Beckwith*, (1889) 129 U. S. 29.

Police powers reserved at time Constitution adopted. — This amendment does not take from the states those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it is not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order. *Giozza v. Tiernan*, (1893) 148 U. S. 662.

Improper motives of the legislature will not be attributed. — To withdraw from any class the protection of the police laws, from prejudice or from any desire to discourage their presence, would be inhuman and barbarous, and the court will not attribute any such motives to a co-ordinate department of the government. *People v. Brady*, (1870) 40 Cal. 198.

Removal of snow from sidewalk. — The constitutional provision was held to be violated by a municipal ordinance which required the tenant or occupant, or, if there be no tenant, the owner of premises on every street having a sidewalk, to remove the snow. *State v. Jackman*, (1898) 69 N. H. 318.

(2) *Question of Reasonableness.* — In determining the question of the reasonableness of a police regulation, a state legislature is at liberty to act with reference to the established usages, customs, and conditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order.

Plessy v. Ferguson, (1896) 163 U. S. 550.

(3) *Wisdom or Policy of Statutes.* — Under the general police power, the legislature has inherent authority to enact laws in promotion of the health, safety, and welfare of the people, and its arm cannot be stayed when exercised for this purpose. Questions relating to the wisdom, policy, and expediency of statutes are for the people's representatives in the legislature assembled, and not for the courts to determine.

Ex p. Boyce, (1904) 27 Nev. 299.

(4) *Instances of Exercise of Police Power* (see also throughout the notes under this division) — (a) *Protection of Highways.* — A state statute which provides that "any person who drives a herd of horses, mules, asses, cattle, sheep, goats, or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway," being general in its application, embracing all persons under substantially like circumstances, and not being an arbitrary exercise of power, does not deny the equal protection of the law.

Jones v. Brim, (1897) 165 U. S. 180, affirming *Brimm v. Jones*, (1895) 11 Utah 200, 13 Utah 440.

(b) *Prohibiting Riding Bicycles on Sidewalks.* — A statute which provides in substance that no person over twelve years old shall ride a bicycle on a sidewalk, although it makes a child's age and not his liability to inflict injury the test to determine whether or not he may ride a bicycle on the sidewalk, cannot be said, as a matter of law, to be an unreasonable regulation of the public right of travel or an arbitrary exercise of legislative power. When any person may make the same use of a highway as every other person of the same age, sex, and condition, employing the same mode of travel, it is an equal law.

State v. Aldrich, (1900) 70 N. H. 392.

(c) *Prohibiting Establishing Hospitals in Built-up Portions of Cities.* — The Pennsylvania Act of April 20, 1899, entitled "An Act for the protection of the public health, prohibiting hereafter the establishing or maintenance of additional hospitals, pest houses, and burial grounds in the built-up portions of cities," was held to be constitutional.

Com. v. Charity Hospital, (1901) 198 Pa. St. 270, the court saying: "It is true that the Act does not prevent the defendant from using its property in a manner which before was lawful, but the defendant, equally with other persons, natural and artificial, holds

its property subject to valid police regulation, made and to be made, for the health and comfort of the people, and if the Act in question is such a regulation, the defendant has no cause of complaint."

(d) **Prohibiting Fat Rendering, Bone Boiling, and Fertiliser Manufacturing.** — A statute which prohibited the business of fat rendering, bone boiling, or the manufacture of fertilizers, within the limits of any incorporated city, or within three miles distant therefrom, and made the violation of the provisions a misdemeanor which, by its terms, was not applicable to certain counties, was held not to violate the Federal Constitution, but to be a proper exercise of the state's police powers.

People v. Rosenberg, 67 Hun (N. Y.) 52.

(e) **Regulation of Prostitution.** — A municipal ordinance prescribing limits in that city outside of which no woman of lewd character shall dwell, does not deprive property owners within the prescribed limits of the equal protection of the laws.

L'Hote v. New Orleans, (1900) 177 U. S. 595.

A Washington statute providing that "any male person who lives with, or who lives off of, in whole or in part, or accepts any of the earnings of a prostitute, or connives in or solicits or attempts to solicit any male person or persons to have sexual intercourse, or cohabit with a prostitute, or who shall invite, direct, or select any person to go to a house of ill-fame, for any immoral purpose; or any person who shall entice, decoy, place, take, or receive any female child or person under the age of eighteen years, into any house of ill-fame or disorderly house, or any house, for the purpose of prostitution; or any person who, having in his or her custody or control such child, shall dispose of it to be so received, or to be received in or for any

obscene, indecent, or immoral purpose, exhibition, or practice, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than five years, and fined in any sum not less than one thousand dollars nor more than five thousand dollars," is not invalid as discriminating between male and female persons, by making it a felony for a male person to live with, or off of, or to accept, the earnings of a prostitute, while a female may do these acts without criminal liability. Prostitution is unlawful, and against public policy and good morals, and is subject to police regulation, and the legislature may therefore restrict it to such classes, or prohibit it by such penalties, as may be deemed necessary, without infringing upon the constitutional provisions referred to. *State v. Graham*, (1904) 34 Wash. 82.

(f) **House of Refuge Act.** — A statute entitled "An Act for the establishment of a house of refuge for women" was held not to violate the constitutional provision because it provided for women between the ages of fifteen and thirty, guilty of misdemeanors, a punishment different in place and period from that prescribed for transgressors of other ages.

People v. Coon, (1893) 67 Hun (N. Y.) 523.

(g) **Regulating Sale of Seed Cotton.** — A statute declaring that it shall be unlawful for any person to sell, deliver, or receive for a price, etc., any cotton in the seed where the quantity is less than what is usually baled, and requiring that every such sale of seed cotton shall be in writing, signed by all the parties thereto, and witnessed by two witnesses in a form prescribed, and further, that said receipt shall be delivered, with a fee, to the nearest justice of the peace, whose duty it shall be to docket the same in his civil docket for the inspection of all persons, was held to be a constitutional exercise of the police power.

State v. Moore, (1889) 104 N. Car. 714, the court saying: "The statute * * * comes within the designation of a public local law. Such laws, if they operate uniformly and subject all persons who come within the defined locality and violate their provisions to indictment in the same way, and to the same punishment, are not repugnant to the constitution. * * * The states did not

originally delegate to the government of the United States the power to protect the citizens of the state, and the duty originally assumed by the states of guaranteeing equal rights to all remains still equally as binding as an obligation and unimpaired as a right as when the Federal Constitution was adopted. The Fourteenth Amendment extends the right of citizenship in the state and

nation to all persons born and naturalized in the United States and subject to the jurisdiction thereof, and assumes for the federal government the obligation to protect all

* * * against oppression under any law enacted by a state that * * * denies to them the equal protection of the law."

e. STATE CONTROL OVER COURT PROCEDURE — (1) *In General.* — The equal protection of the law is denied by a state court when it is apparent that the same law or course of procedure would not, and could not, lawfully be applied to any other person in the state under similar circumstances.

Ex p. Stricker, (1901) 109 Fed. Rep. 150.

Questions of practice. — The constitutional provision was not intended to control or regulate mere matters of practice in the state courts, but was intended to secure the same — an equal — protection to every person or company in a class that is accorded to every other person or company in the same class. *Andrus v. Fidelity Mut. L. Ins. Assoc.*, (1902) 168 Mo. 151.

That a state is a party plaintiff does not

create such an inequality of position as that the defendant can be said to be deprived of the equal protection of the laws. A state statute providing that the state "may sue in its own name and is entitled to all the remedies provided for the enforcement of rights between individuals without giving bond or security or causing affidavit to be made, though the same may be required if the action were between private citizens," does not so result. *Alabama v. Wolfe*, (1883) 18 Fed. Rep. 839.

(2) *Change in Construction of Procedure Statute.* — There is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.

Backus v. Ft. Street Union Depot Co., (1898) 169 U. S. 571.

(3) *Different Modes of Ascertaining Damages to Property.* — A statute which makes different provisions for determining the damages suffered by persons whose property is taken or injured in the progress of public works does not deprive them of the equal protection of the laws.

Burnett v. Com., (1897) 169 Mass. 422.

(4) *Different Tribunals for Different Persons.* — When the protection of equal laws equally administered has been enjoyed, it cannot be said that there has been a denial of the equal protection of the law within the purview of the Fourteenth Amendment, only because the state has allowed one person to seek one forum and has not allowed another person, asserted to be in the same class, to seek the same forum, although as to both persons the law has afforded a forum in which the same and equal laws are applicable and administered.

Cincinnati St. R. Co. v. Snell, (1904) 193 U. S. 36, wherein the court said: "It is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a state may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where

fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the state has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is

authorized to proceed by a state which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the state has provided equal laws prevail."

This clause is intended to prevent the establishment of tribunals for one class of persons varying from those which determine the rights of all. *Charge to Grand Jury*, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260.

(5) *Venue*. — The provision in a state constitution that "a corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases," does not conflict with this amendment, nor deny to a corporation the right to have an action in the county where it has its principal place of business.

Lewis v. South Pac. Coast R. Co., (1884) 66 Cal. 209.

Change of venue — exempting certain locality. — Statutory authority authorizing the change of venue in causes of action gen-

erally throughout the jurisdiction, and exempting a certain locality from its benefits, would violate the constitutional provision. *State v. Hayes*, (1884) 81 Mo. 574. But see generally, *infra*, *Relating to Local Government*, p. 594.

(6) *Constitutional Amendment Fixing Jurisdiction of Cases Previously Appealed*. — An amendment to a state constitution dividing the Supreme Court into two divisions, and giving division number two exclusive jurisdiction of criminal cases, is not in conflict with the Constitution of the United States as denying the equal protection of the laws because of its application to cases which had been appealed prior to its adoption.

State v. Jackson, (1891) 105 Mo. 196.

(7) *Refusal of Application to File Supplementary Answer*. — The refusal of a state court to grant an application for leave to file a supplementary answer, is not a denial of the equal protection of the laws when there is no abuse of discretion.

Sawyer v. Piper, (1903) 189 U. S. 157.

(8) *Trial by Jury* (see *Exclusion of Negroes from Juries*, and *Discriminating Against Mongolians as Jurors*, pp. 561 and 569). — The equal protection of laws is not denied by a provision in a state constitution abridging the right of trial by jury in the courts of a city within that state, without making a similar provision for the counties of the state.

Chappell Chemical, etc., Co. v. Sulphur Mines Co., (1899) 172 U. S. 475.

A jury composed exclusively of male persons when the constitution of the state requires that women, equally with men, shall be subject and eligible to jury duty where they possess the same qualifications as men, does not deny to the male defendant the equal protection of the laws. *McKinney v. State*, (1902) 3 Wyo. 724.

Jury trial on alleged insurance misrepresentations. — Where, in an action on a life insurance policy, the answer prayed for the annulment of the policy by the exercise of the

court's equitable jurisdiction on the ground of misrepresentation, and the court submitted the case to the jury and denied a hearing in equity, it was held that under the *Missouri* statute the liability of the company after the death of the insured could only be avoided by showing that some misrepresentation induced the company to issue the policy, and that the matter misrepresented contributed to his death, and this defense was strictly legal, triable by a jury, and would be such without the statute declaring that issues in such cases shall be determined by a jury; also that the statute did not contravene the constitutional amendment. *Schuermann v. Union Cent. L. Ins. Co.*, (1901) 165 Mo. 641.

In election contests.—An *Alabama* Act which provided that “in all contests of elections for the office of justice of the peace or constable, or for any office which is filled by the vote of a single county, except for members of the general assembly, the person whose election is contested is entitled to a trial by jury” was held to be constitutional, the court saying: “The provision comprehends, without discrimination, all persons falling within the class designated. It acts equally and uniformly upon all persons whose election to office, filled in the designated way, except members of the general assembly (which exception comprehends a class upon which it operates uniformly) is contested. * * * It was competent for the legislature to withhold the right entirely, or extend it to one class of officials to the exclusion of other classes, or to one class of parties to the exclusion of another class.” *Taliaferro v. Lee*, (1893) 97 Ala. 92.

Requiring party to pay costs on application for special jury.—A statute of *Missouri* which provided that “in every city in the state of Missouri having over one hundred

thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered, the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said court the names of the persons to be summoned for such special jury, and said officer shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party,” etc., was held to be constitutional. The constitutional provision is not violated because a party who applies for a special jury must deposit the costs thereof, and a poor man is thereby deprived of having a special jury. *Eckrich v. St. Louis Transit Co.*, (1903) 176 Mo. 621.

(9) *Discretion to Prosecute by Information or Indictment.*—The vesting of power in a state court to decide which of two modes may be pursued in the prosecution of criminal cases, where either one of two is lawfully authorized by the constitution of the state, and where equal protection of the law of either forum is accorded all persons under like circumstances, is not a delegation to the courts of a power to discriminate between citizens to their disadvantage or inequality of right.

State v. Little Whirlwind, (1899) 22 Mont. 428.

(10) *Peremptory Challenges.*—The equal protection of the laws is not denied because a defendant is given the same number of peremptory challenges upon an arrangement for trial by a struck jury that he would have in a trial before an ordinary jury.

Brown v. New Jersey, (1899) 175 U. S. 176.

Parties on same side must join in challenging.—A statutory provision requiring that where there are several parties on either

side of an action they must join in challenging a juror before it can be made, does not violate the constitutional provision. *Muller v. Hale*, (1902) 138 Cal. 163.

Allowing State More Challenges in Large Cities.—A state statute which provides that in all capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, does not deny the equal protection of the laws.

Hayes v. Missouri, (1887) 120 U. S. 69.

(11) *Failure to Provide Method for Enforcing Attendance of Nonresident Witnesses.*—The failure of the law to provide the method for enforcing the attendance of nonresident witnesses, and for the procuring and reception of their depositions, is not in a particular case a denial to the accused of the equal protection of the laws.

Minder v. State, (1901) 113 Ga. 772, affirmed (1902) 183 U. S. 559. In this case the court said: "We do not see how a person on trial could be so said to be denied the

equal protection of the laws when he is tried under laws of procedure applicable to every person charged with crime."

(12) *Ex Parte Depositions*. — A statute which prohibits the taking of *ex parte* depositions by either party, where one of the parties consists of a corporation, is not contrary to the constitutional provision, as parties to suits are placed upon an equal footing.

Houston, etc., *R. Co. v. Stuart*, (Tex. Civ. App. 1898) 48 S. W. Rep. 799.

(13) *Allowance of Attorney's Fees and Damages* — (a) *In Actions Against Railroads* — aa. *IN ACTIONS GENERALLY*. — A statute which provides that in an action for certain claims against a railroad company, if the plaintiff obtains judgment he shall be entitled to recover the amount of such claim and all costs, and in addition thereto, all reasonable attorney's fees, not to exceed ten dollars, cannot be sustained. Such a statute cannot be upheld on the ground that the penalty is cast only upon corporations, that to them special privileges are granted and therefore upon them special burdens may be imposed, as the penalty is not imposed upon all business corporations; nor does the peculiar and hazardous business of railroading carry with it a special necessity for the prompt payment of debts. "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other."

Gulf, etc., R. Co. v. Ellis, (1897) 165 U. S. 156. See also *Los Angeles Gold Mine Co. v. Campbell*, (1899) 13 Colo. App. 2, as to a *Colorado* statute providing that "in all suits for the foreclosure of liens provided for in this Act, in which the plaintiff shall obtain a judgment and decree of foreclosure against the property described in said lien, there shall be taxed as costs, in addition to the costs already provided for in such cases, a reasonable sum as an attorney fee to be fixed by the court at the time of rendering such judgment and decree."

The following cases should be noted in light of the case of *Atchison, etc., R. Co. v. Matthews*, (1899) 174 U. S. 96, noted *infra*, *In Actions for Damages Caused by Communicated Fires*, p. 555.

An *Illinois* statute concerning the fencing and operation of railroads, which authorized the recovery of damages and reasonable attorney's fees in case of a violation of the Act, was held to be constitutional. *Cleveland, etc., R. Co. v. Hamilton*, (1903) 200 Ill. 633. In this case the court said: "Corporations have equal rights with natural persons to de-

fend against claims which they believe to be illegal or exorbitant, but this statute does not provide for the recovery of attorney's fees unless it shall be judicially determined that the defendant had neglected its duty and been guilty of a violation of the statute. If no damages are recovered there can be no attorneys' fees, and if the corporation deems the demand exorbitant it is entitled to make a tender of the actual damages."

An *Iowa* statute establishing a railroad commission entitling the plaintiff in actions against a railroad company for a breach of its provisions to recover, in addition to the damages therein provided, for, an attorney's fee, is valid. *Burlington, etc., R. Co. v. Dey*, (1891) 82 Iowa 313.

A *Mississippi* Act which provided "that whenever an appeal shall be taken from the judgment of any court, in any action for damages, brought by any citizen of this state against any corporation, a reasonable attorney's fee for the appellee shall be assessed by the court and certified by the clerk of the court or justice of the peace, as the case may be, to the Appellate Court, and upon affirm-

ance of the judgment a judgment for the amount so assessed shall be rendered in favor of the appellee and against the appellant, and the sureties on his appeal bond, and collection thereof shall be had in the same manner as of other judgments rendered on appeals; provided, the fee so assessed shall not be less than fifteen dollars in appeal from the court of a justice of the peace, nor less than twenty-five dollars in appeal from the judgment of a Circuit Court," was held to be unconstitutional. *Chicago, etc., R. Co. v. Moss*, (1882) 60 Miss. 641.

On appeal from magistrate's decision.—An *Alabama* statute which provided that "any corporation, person or persons, owning or controlling any railroad in this state, or any complainant against such corporation, person or persons, taking an appeal from a decision rendered by a justice of the peace, in suit for damages brought under the provisions of section 1711 [of the Code] and failing to sustain such appeal, or to reduce or increase the judgment before the Appellate Court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed twenty dollars; and the attorney's fee shall be part of the cost, and collected as such," was held to be unconstitutional. *South, etc., Alabama R. Co. v. Morris*, (1880) 65 Ala. 193.

In actions for killing stock.—An *Arkansas* statute which provided for the appointment of a board by the parties, or either party if the other should neglect to appoint an appraiser after notification to do so, to assess damages, and that if either party refused to abide by the assessment, making it necessary to bring a suit by the other party, the delinquent party should be subject to the attorney's fee where the judgment of the court was not

more favorable to him than the award of the board, was held to be unconstitutional. *St. Louis, etc., R. Co. v. Williams*, (1887) 49 Ark. 492.

A *Kansas* statute giving a reasonable attorney's fee to the plaintiff, in the case of a recovery, for the prosecution of a suit against a railroad corporation for the value of stock killed or injured, was held to be constitutional. *Kansas Pac. R. Co. v. Mower*, (1876) 16 Kan. 573. See also *Kansas Pac. R. Co. v. Yanz*, (1876) 16 Kan. 583.

The *Michigan* Act of 1885 which authorized the plaintiff, in a suit against a railroad company, to recover damages for killing cattle, but taxed the attorney's fee of twenty-five dollars as part of his costs, was held to be unconstitutional. *Wilder v. Chicago, etc., R. Co.*, (1888) 70 Mich. 382, the court saying: "The imposing of the attorney fee of twenty-five dollars as costs, cannot be upheld. The legislature cannot make unjust distinctions between classes of suitors without violating the spirit of the Constitution. Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny."

A *Texas* statute which provides that where there shall be presented a claim to a railroad not exceeding fifty dollars for the killing of stock, and the claim is not paid within a certain time, there may be recovered, in addition, an attorney's fee, was held not to be unconstitutional. *Gulf, etc., R. Co. v. Ellis*, (Tex. 1892) 18 S. W. Rep. 723.

bb. IN ACTIONS FOR DAMAGES CAUSED BY COMMUNICATED FIRES.—A state statute providing that in all actions brought under the statute against railway companies for damages by fire caused by operating the railroad, if the plaintiff recover there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment, does not deny the equal protection of the laws when it is held by the state Supreme Court to be somewhat in the nature of a police regulation, designed to enforce care on the part of the railroad companies, and giving full force to the presumption which attaches to the action of a state legislature that it has full knowledge of the conditions within the state, and intends no arbitrary selection or punishment, but simply seeks to subserve the general interest of the public.

Atchison, etc., R. Co. v. Matthews, (1899) 174 U. S. 96, wherein the court said: "When the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only

the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said

that the differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality." *Affirming* (1897) 58 Kan. 447. See

also *Missouri, etc., R. Co. v. Simonson*, (1902) 64 Kan. 802; *Missouri Pac. R. Co. v. Merrill*, (1888) 40 Kan. 404; *Clark v. Ellithorpe*, (1897) 7 Kan. App. 342.

(b) **In Actions Against Insurance Companies.** — A statute providing that, upon rendering judgment against an insurance company upon a policy of insurance on real property against total loss, the court shall allow the plaintiff a reasonable sum as an attorney's fee, is not a denial of the equal protection of the laws, either for classifying losses on real estate separately from losses on other property, or for allowing the fee in case of a total loss of real estate insured, and not permitting recovery of such fee when the property insured has been only partially destroyed.

Farmers', etc., Ins. Co. v. Dobney, (1903) 189 U. S. 305, wherein the court said that contracts of insurance, generically considered, possess such distinctive attributes as to justify their classification separate from other contracts, and as between themselves may be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened; *affirming* (1901) 62 Neb. 213. See also *Niagara F. Ins. Co. v. Cornell*, (1901) 110 Fed. Rep. 821; *Tillis v. Liverpool, etc., Ins. Co.*, (Fla. 1903) 35 So. Rep. 171; *Continental F. Ins. Co. v. Whitaker*, (1903) 112 Tenn. 151. But see *Phenix Ins. Co. v. Hart*, (1900) 112 Ga. 765; *Phenix Ins. Co. v. Schwartz*, (1902) 115 Ga. 113, and also *Williamson v. Liverpool, etc., Ins. Co.*, (1900) 105 Fed. Rep. 32, in which case the court said that the case of *Atchison, etc., R. Co. v. Matthews*, (1899) 174 U. S. 96, "has carried the doctrine of the police power of the state, I take it, to its ultimate limit. In this case the court held to be valid an Act of the legislature of the state of Kansas entitled 'An Act relating to the liability of railroad companies for damages by fire,' which provided that, in all actions commenced under this Act, if the plaintiff shall recover there shall be allowed

him by the court a reasonable attorney's fee, which shall become a part of the judgment. This ruling was bottomed on the distinct proposition that there is a peculiar danger of fire from the running of railroad trains. The locomotives, passing as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, and sometimes in spite of such care, scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie state like Kansas. Fire catching in the dry grass runs for miles, destroying not merely crops, but houses and barns.' And because of the widespread and far-reaching disaster to whole communities, integral parts of the state, incident to the escape of fire, endangering life and property, the public welfare was held to be directly involved in such calamity, and brought the instance within the police power of the state to regulate, as a preventive and protective remedy. The vigorous dissent of four out of nine justices gives assurance that the distinction almost metaphysically drawn by Mr. Justice Brewer between that ruling and the principles enunciated in the *Ellis Case* [*Gulf, etc., R. Co. v. Ellis*, (1896) 165 U. S. 150] is not to be still further advanced."

On Certain Life and Health Insurance Policies. — A statute which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent. damages, together with reasonable attorney's fees, does not deny the equal protection of the laws in failing to impose the same conditions on fire, marine, and inland insurance companies, and on mutual benefit and relief organizations doing business through lodge and mutual relief benevolent associations.

Fidelity Mut. L. Assoc. v. Mettler, (1902) 185 U. S. 325. See also *Merchants L. Assoc. v. Yoakum*, (C. C. A. 1899) 98 Fed. Rep. 251; *Mutual L. Ins. Co. v. Walden*, (Tex. Civ. App. 1894) 26 S. W. Rep. 1012; *Sun L. Ins. Co. v. Phillips*, (Tex. Civ. App. 1902) 70

S. W. Rep. 603; *Mutual L. Ins. Co. v. Blodgett*, (1894) 8 Tex. Civ. App. 45; *Union Cent. L. Ins. Co. v. Chowning*, (1894) 86 Tex. 654; *Mutual L. Ins. Co. v. Simpson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 837.

(c) **In Action on Mechanic's Lien.** — A statute providing "that if upon trial of the case it shall be found in favor of the plaintiff, then judgment shall be rendered in his favor for the amount as returned by the jury, together with the costs

of the court, and an attorney's fee of not less than ten dollars (\$10) if the suit is tried before a justice of the peace, and not less than twenty-five dollars (\$25) if it be tried before the county judge, the judge of the county or circuit court," is valid.

Dell v. Marvin, (1899) 41 Fla. 226.

(14) *Costs*. — A state statute which provides that "whenever it shall appear to the court or jury trying the case that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid," does not deny the equal protection of the law, as the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power.

Lowe v. Kansas, (1896) 163 U. S. 88.

Security for costs. — A New York statute providing that the defendant may require security for costs in certain cases does not violate this clause. *Venanzio v. Weir*, (1901) 64 N. Y. App. Div. 433.

Costs in cases tried together. — The constitutional provision is not violated by a statute providing: "If two or more cases are tried together in the Supreme Judicial Court, in the Superior Court, or in a police, district, or municipal court, the presiding judge may reduce the witness fees and other costs; but not less than the ordinary witness fees and other costs recoverable in one of the cases which are so tried together, shall be allowed." *Green v. Sklar*, (Mass. 1905) 74 N. E. Rep. 595, the court saying: "While the statute provides that costs may be reduced when two or more cases are tried together, the law applies to all cases that come within the prescribed class, and it does not make an arbitrary distinction. The classification rests upon a difference which bears a reasonable and just relation to the subject in respect to which the classification is made."

To allow suitors in proceedings under a special statute to recover full costs is by no means an unjust discrimination because suitors under other statutes are denied them. *La Goo v. Seaman*, (Mich. 1904) 99 N. W. Rep. 393.

Allowance of extra costs in certain actions against railroads. — A statute of Minnesota which allowed an extra allowance of ten dollars in the justice's court, and double costs in the District Court in case of a recovery in actions brought against railroad companies for neglecting to fence their ways, was held not to be unconstitutional. *Johnson v. Chicago, etc., R. Co.*, (1882) 29 Minn. 425, the court saying: "The chief purpose of the allowance of costs is compensation or indemnity for expenses incurred in enforcing a legal or resisting an illegal claim, though in some cases the legislature are also influenced by considerations of public policy. The right of the legislature to regulate the practice and proceedings of suitors in the tribunals of the state, including such reasonable regulations as to the adjustment of costs and expenses between the parties as may best promote the ends of justice and the public good, has been too long exercised and established to be questioned. The principle that governs the allowance of costs does not require that they should be uniform in all actions, nor the same to each of the litigants in an action; and so double or extra costs are sometimes allowed to plaintiffs or defendants, as the case may be, because deemed proper from the nature and circumstances of certain species of litigation." *Johnson v. Chicago, etc., R. Co.*, (1882) 29 Minn. 425, followed in *Schimmele v. Chicago, etc., R. Co.*, (1885) 34 Minn. 216. See also *Liquidating Com'rs v. Marrero*, (1902) 106 La. 130.

(15) *Allowance of Interest on Affirmance of Appeal*. — A statute under which the state Supreme Court may allow interest upon affirmance of a judgment appealed from does not violate this clause.

Syndicate Imp. Co. v. Bradley, (1897) 7 Wyo. 235.

(16) *Sentence by Judge de Facto*. — When by a state law, at the time of the trial and sentence of an accused person, the court in which he was tried and sentenced was a court *de jure*, and the judge who tried and sentenced him was

at least a judge *de facto*, and the sentence itself was valid, such sentence is not a denial of the equal protection of the law.

In re Manning, (1891) 139 U. S. 506.

(17) *Resentence After Serving Part of Illegal Sentence*. — One who has been sentenced by a court having jurisdiction of the offense and of the person, and the right to sentence to the place designated, and who has served a substantial portion of the time for which he was sentenced, may be resented if it turns out on writ of error brought by him that the original sentence was unlawful, and in so doing the defendant is not denied the equal protection of the laws.

Com. v. Murphy, (1899) 174 Mass. 370.

(18) *Refusal to Amend the Record*. — The refusal of a state appellate court to amend a record so as to show that the accused was not present in person or by counsel in that court at the time it affirmed the judgment of the trial court and fixed the time for carrying that judgment into execution, is not a denial of the equal protection of the laws when the law of that state, as declared by its highest court, is, that amendments of the record of a court in derogation of a final judgment are not permitted in that state after the expiration of the term at which the judgment was rendered. The state law is applicable to all persons within the jurisdiction of the state.

Fielden v. Illinois, (1892) 143 U. S. 456, *affirming* (1889) 128 Ill. 595.

(19) *Right of Appeal*. — There is no denial of the equal protection of the laws because in one district the state is allowed an appeal and such an appeal is not allowed in another district of the same state.

Mallett v. North Carolina, (1901) 181 U. S. 597, *affirming* (1899) 125 N. Car. 718. See also *Sullivan v. Haug*, (1890) 82 Mich. 548.

This clause "contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a state from arranging and parcelling out the jurisdiction of its several courts at its discretion. * * * [It] is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power

of a state to regulate its internal affairs to deny to it this right." *Missouri v. Lewis*, (1879) 101 U. S. 30.

Provisions relating to transportation companies. — A *Florida* statute provides for a state railroad commission, defining the duties and powers of such commission over railroads and other transportation companies doing business in the state, and providing remedies for the enforcement of the powers conferred upon the commission. For the purpose of expediting the disposition of a case brought under the provisions of the Act, the statute puts all such cases in a class, and requires that when they are carried for review from an inferior to a superior court, the appellate proceedings must be returned before the appellate courts within thirty days, and that all cases thus classified shall have preference over other causes before the appellate courts in the hearing and determination thereof. It was held that this was a reasonable classification and a legitimate declaration of the legislative purpose that the final disposition in the courts of all cases growing out of the general regulation of railroads and other transportation companies by the railroad commission should be expedited, and this for the purpose of making such commission more effective to accomplish the purposes of its

creation. *State v. Jacksonville Terminal Co.*, (1899) 41 Fla. 375.

Dependent on amount in controversy. — The amendatory Act of the Illinois legislature passed in 1887 (Laws of 1887, p. 156), added to sec. 8 of the Appellate Court Act (Hurd's Stat. 1889, p. 415), which contained the proviso "that in all actions where there

was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the appellate courts to the Supreme Court where the amount claimed in the pleadings exceeds one thousand dollars," does not as construed deprive any suitor of the equal protection of the laws. *Cummings v. Chicago, etc., R. Co.*, (1901) 189 Ill. 609.

f. CONTEMPT OF COURT. — Statutory provisions pertaining to proceedings in courts of the district in which the debtor resides, which authorize a decree fixing the payment by the debtor, on proof that the debt was for necessities, and provide that a failure to conform to the decree may be regarded as a contempt of court, do not violate the constitutional provision.

Brown's Case, (1899) 173 Mass. 498.

g. STATUTES OF LIMITATIONS. — A statute of limitations which operates upon written contracts thereafter executed, and continues in force the prior limitation law as to all contracts previously executed, is not void as lacking a uniform operation.

McKean v. Archer, (1892) 52 Fed. Rep. 791.

Applied to particular railroad companies. — A *North Carolina* statute limiting actions for damages for occupation of land by a railroad company to five years, and exempting from its operation companies chartered prior to 1868, does not deny the equal protection of the laws. *Narvon v. Wilmington, etc., R. Co.*, (1898) 122 N. Car. 856.

Contracts made in other states. — The state has the authority to outlaw remedies

upon contracts made in other states where action is not brought within the prescribed time, notwithstanding that the limitation period is longer concerning contracts arising in the state than the period prescribed for those made without the state. *Hawse v. Burgmire*, (1878) 4 Colo. 313.

The constitutional provision is not violated by a state statute which provides that where an action is brought on a written instrument executed beyond the state, the action must be brought within two years. *Higgins v. Graham*, (1904) 143 Cal. 131.

h. RELATING TO CRIMES — (1) *Habitual Criminal Statute.* — A state statute providing that "whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, upon conviction of a felony committed in this state after the passage of this Act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for twenty-five years," does not deny to any one the equal protection of the laws, as the aggravated penalty prescribed affects alike all persons similarly situated.

McDonald v. Massachusetts, (1901) 180 U. S. 311.

A state statute may provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for the first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Moore v. Missouri*, (1895) 159 U. S. 678.

A *Kentucky* statute providing that "every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the

first conviction, and, if convicted a third time of felony, he shall be confined in the penitentiary during his life," does not deny to a person convicted of larceny and twice previously found guilty of the crime of larceny, the equal protection of the law. Every other person convicted as he had been, would have been subject to the like punishment. *In re Boggs*, (1891) 45 Fed. Rep. 475.

The *Massachusetts* statute of 1887, entitled "An Act to provide for the punishment of habitual criminals," was held not to violate the constitutional amendment. *Sturtevant v. Com.*, (1893) 158 Mass. 598. See also *McDonald v. Com.*, (1899) 173 Mass. 322.

(2) *Different Sentences.* — Sentences imposed on a conviction of a common-law offense, more severe than ever before inflicted in the state for a like offense, and giving two of the codefendants longer terms than the third, do not amount to a denial of the equal protection of the laws.

Howard v. Fleming, (1903) 191 U. S. 135.

(3) *Different Penalties for Different Offenses.* — Where several different acts are prohibited by law, a difference in the penalties for the violation of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens.

State v. Hogreiver, (1899) 152 Ind. 661, holding that the statute prohibiting the playing of base ball on Sunday where a fee is charged is not invalid as singling out persons engaged in this particular calling, who are

skilled in the game and earn a livelihood by it as an occupation, and prohibiting them from exercising it on Sunday, under other and more severe penalties than those imposed on citizens engaged in other kinds of business.

(4) *Different Penalties in Different Localities.* — A statute is not unconstitutional in prescribing that resident owners of stock found running at large in a town shall pay a higher penalty than nonresident owners, as the Act bears alike on all persons within a defined locality.

Broadfoot v. Fayetteville, (1897) 121 N. Car. 418.

(5) *Making Commission of Acts Outside Certain Places Crimes.* — Certain statutes provide that certain acts, viz., keeping a room, or occupying a stand, etc., with books, apparatus, etc., for recording or registering bets or wagers; receiving, registering, and recording the money of others, bet or wagered; becoming the custodian, etc., for hire, of money wagered; pool selling, etc., are prohibited, and punishable criminally wherever committed; that a person who bets his own money on the result of a horse race is not punishable criminally, wherever he bets it; and that an individual who records a wager (his own or that of some one else) by some memorandum in his own possession, and does not transfer any memorandum or token thereof, shall not be punishable criminally if he makes that record on the race course, but may be punished criminally if he makes it elsewhere. It was held that these Acts do not deny the equal protection of the laws.

New York v. Bennett, (1902) 113 Fed. Rep. 516, wherein the court said: "Defendant contends that the statutes of the state deny the equal protection of the laws, because they punish individuals criminally for acts committed in one place, and not for the same acts committed elsewhere. In the multitudinous authorities construing the amendment, most of which are cited in the briefs, no case is found which sustains this proposition, or which holds that the state may not differentiate crimes and punishments as it pleases, so long as such differentiation is not [a discrimination] against a class of persons by reason of their race, or color, or some other individual distinction. There is nothing of that sort here. No class is discrimi-

nated against. Every one, whoever he may be, who records a bet or wager in any other place than the race course, is subjected to the same punishment. No one who merely records such bet when he is on a race course is subject to any punishment. It seems preposterous to hold that the Fourteenth Amendment precludes a state from making the commission of some particular act a crime if committed in the streets of a crowded city, or in a church, or a public building, or on navigable waters, or on the seashore, or at night, and no offense if committed on the highway in some sparsely settled rural district, or in the open country, or on non-navigable waters, or in the mountains, or by daylight."

(6) *Class of Offenders Specially Provided For.*

Embezzlement by guardians.—A statute provides that "whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property delivered to him, or any part thereof, which may be the subject of larceny, shall be deemed guilty of larceny." Under this statute it is no defense to an indictment that the act is in violation of the above constitutional provision, based on the ground that a special arrangement is imposed for a class of offenders, to wit, guardians who embezzle the property of their wards, since the operation of the statute is alike to all persons who commit the offense. *State v. Whitehouse*, (1901) 95 Me. 179.

The clause in a state dispensary law providing that any servant, agent, or employee of any railroad corporation, or of any express company, or of any persons, corporations, or associations doing business in this state as common carriers, who shall remove any in-

toxicating liquors from any railroad car, vessel, or other vehicle for transportation, at any place other than the usual and established stations, wharves, depots, or places of business of such common carriers, within some incorporated city or town where there is a dispensary, or who shall aid in or consent to such removal, etc., shall be subject to a penalty, denies to such servants, agents, and employees the equal protection of the laws. No knowledge on the part of such servant, agent, or employee that it is intoxicating liquor is required. Nor does it make any difference whether the liquor be intended for sale, personal use, or consumption, in any other way. None of the safeguards thrown around every other criminal offense exists. The only qualification is that the city or town in which the package is has no dispensary. This is discrimination, the separation of a class from the whole community, and singling it out for prosecution and punishment. *In re Langford*, (1893) 57 Fed. Rep. 573.

i. RACE DISTINCTIONS AND DISCRIMINATIONS (see also *infra*, *Relating to Suffrage*, p. 571) — (1) *Exclusion of Negroes from Juries* — (a) *In General.* — This amendment secures, among other civil rights, to colored men, when charged with criminal offenses against a state, an impartial jury trial, by jurors indifferently selected or chosen without discrimination against such jurors because of their color. Immunity from any such discrimination is one of the equal rights of all persons, and any withholding it by a state is a denial of the equal protection of the laws, within the meaning of the amendment.

Ex p. Virginia, (1879) 100 U. S. 345. See also *State v. Joseph*, (1893) 45 La. Ann. 905; *Dixon v. State*, (1896) 74 Miss. 271; *Bullock v. State*, (1900) 65 N. J. L. 557.

"While a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications, and while a mixed jury in a particular case is not, within the meaning of the Constitution, always or absolutely necessary to the enjoyment of the equal protection of the laws, and therefore an accused, being of the colored race, cannot claim as a matter of right that his race shall be represented on the jury, yet a denial to the citizens of the African race, because of their color, of the right or privilege accorded to white citizens of participating as jurors in the administration of justice would be discrimination against the former inconsistent with the amendment and within the power of Congress, by appropriate legislation, to prevent." *Gibson v. Mississippi*, (1896) 102 U. S. 580.

The exclusion of all persons of the negro race from a grand jury which finds an indictment against a negro, where they are excluded solely because of their race or color, denies to him the equal protection of the laws. *State v. Peoples*, (1902) 131 N. Car. 784.

A West Virginia statute providing that "all white male persons who are twenty-one years of age, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided," discriminating in the selection of jurors against negroes because of their color, was held to amount to a denial of the equal protection of the laws to a colored man when put upon trial for an alleged offense against the state. *Strauder v. West Virginia*, (1879) 100 U. S. 305, reversing *State v. Strauder*, (1877) 11 W. Va. 745.

In Maryland, prior to the Act of 1867, ch. 329, the sheriff made the selection of the panel after the common-law method. The legislature deeming it wise to guard the formation of juries more effectually against personal and political influences, adopted by that Act the present system, by which the judges of the Circuit Court make the selection from certain lists furnished them. First a given number of names are selected and from that number the forty-eight are drawn. From the forty-eight, after designating one of them as foreman, twenty-two are selected to constitute the grand jury; the remaining twenty-five constitute the petit jury. One list is made from the tax-book after each general election next before the drawing of "the white male taxable inhabitants of the county," etc.; all the names on the poll

books of the districts of the county returned and filed in the clerk's office likewise after the general election, next before the drawing, are contained in the other list. From the list of taxables and the names that the pass-books contain, the necessary persons are to be selected impartially, and the selection must be made "with special reference to the intelligence, sobriety, and integrity of such persons, and without the least reference to their political opinion." Under the system it was held that there is no unconstitutional discrimination against the negro race in the selection of jurors, the court saying: "The question, therefore, is whether the confining the list of taxables to those only who are white persons, taken together with all the other provisions of the law, operates as an obstacle to the free selection of colored persons as jurors. If the list of taxables were the only source from which jurors could be selected, the objection would be well founded; but as the poll books are likewise furnished

on which the white taxables also appear under the more comprehensive classification of voters, together with all the colored voters of the county, practically the distinction appearing on the list of taxables is merged or lost." *Cooper v. State*, (1885) 64 Md. 46.

Where it was shown, on a motion to quash an indictment against a negro because no negroes were selected to serve on the grand jury, and that there was a discrimination against the negro race, that there were eight hundred and fifty-nine white and one hundred and seventy-five negro electors in the county, and that no negroes had been drawn to serve on the jury for eighteen years, and the commissioners testified that they had selected jurors whom they believed to be qualified, and it was not discussed whether or not negroes should serve, a finding that negroes were not unlawfully excluded was held not to be erroneous. *Eastling v. State*, (1901) 69 Ark. 189.

There Is No Right to Have the Jury Composed in Part of colored men, so long as in the selection of jurors to pass upon the life, liberty, or property of a colored man, there has been no exclusion of his race, and no discrimination against them because of their color.

Virginia v. Rives, (1879) 100 U. S. 322. See also *County Judge's Case*, (1878) 3 Hughes (U. S.) 576; *State v. Joseph*, (1893) 45 La. Ann. 903; *Cooper v. State*, (1885) 64 Md. 47; *State v. Brown*, (1894) 119 Mo. 536; *State v. Sloan*, (1887) 97 N. Car. 499; *Lawrence v. Com.*, (1886) 81 Va. 484; *Cavitt v. State*, (1883) 15 Tex. App. 190.

A petit jury panel will not be set aside on the ground that white men only were selected, where it was not shown that the officers who made the selection excluded colored persons on account of their color. *Bush v. Kentucky*, (1882) 107 U. S. 110; *State v. Murray*, (1895) 47 La. Ann. 1424.

No negro on the grand jury.—The fact that there was no member of the race to which the defendant belongs on the grand jury that found the bill of indictment against him, was held not to be violative of the Constitution of the United States unless there was a discrimination against his race by the constitution, statutes, or laws of South Carolina, or in the administration thereof, on account of race, color, or previous condition of servitude. *State v. Brownfield*, (1901) 60 S. Car. 509.

Race discrimination in the organization of a grand jury makes a good ground of challenge. *Carter v. State*, (1898) 39 Tex. Crim. 352.

When a State Officer, in Violation of State Law, undertakes to deprive an accused party of a right which the statute law affords him, it ought to be presumed that that court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced.

Virginia v. Rives, (1879) 100 U. S. 321.

An actual discrimination against a negro, on account of his race, by officers intrusted with the duty of carrying out the law, is as potential in creating a denial of equality of rights as a discrimination made by law. *Tarrance v. Florida*, (1903) 188 U. S. 520.

A negro on trial in a criminal case is not deprived of the rights guaranteed to him under the United States Constitution because no colored man was entered on the panel returned on the trial of the defendant. *Bullock v. State*, (1900) 65 N. J. L. 557, the court saying: "This provision relates to state action exclusively, and was designed as

a protection against acts of the state and not the acts of persons."

Where jury commissioners intentionally excluded negroes in the selection of jurors to serve on the grand jury, it was held that a motion to quash the indictment by a negro defendant should have been granted, as the constitutional provision was violated. *Collins v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 42; *Whitney v. State*, (1900) 42 Tex. Crim. 283; *Kipper v. State*, (1901) 42 Tex. Crim. 613; *Leach v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 422; *New York L. Ins. Co. v. Orlopp*, (1901) 25 Tex. Civ. App. 284; *Smith v. State*, (1900) 42 Tex. Crim. 220.

When a State Statute Excludes All Persons Other than White Men from service on juries, it should be assumed, in the absence of any evidence that the selection of jurors was in fact made without discrimination of colored citizens because of their race, that the jury commissioner followed the statutes so far as they restricted the selection of grand jurors to citizens of the white race.

Bush v. Kentucky, (1882) 107 U. S. 122. See *Com. v. Johnson*, (1880) 78 Ky. 509.

A State Statute Enacted Prior to the Adoption of the Fourteenth and Fifteenth Amendments, providing that all qualified to vote at the general election shall be liable to serve as jurors, when the state constitution limited the right to vote to free white male citizens, does not deny to colored persons the equal protection of the laws by excluding colored persons from jury service, as the Fifteenth Amendment had the effect in law to remove from the state constitution that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the state constitution, as modified by the supreme law of the land, were qualified to vote at a general election.

Neal v. Delaware, (1880) 103 U. S. 389.

(b) **Exclusion Must Be Shown.** — The equal protection of the laws is not denied by the refusal of a motion to quash an indictment against a negro, found by a grand jury composed wholly of white persons, on the ground that all negroes, although constituting four-fifths of the population and of the registered voters of the county, were excluded on account of their race and color, when there was no offer to prove the allegations.

Brownfield v. South Carolina, (1903) 189 U. S. 426.

Burden of proof on party alleging discrimination. — Where it is alleged by a negro that he has been denied the equal protection of the laws on account of discrimination against negroes in the impaneling of the grand jury, the burden of establishing such discrimination is on the negro. *Whitney v. State*, (1901) 43 Tex. Crim. 197, the court saying: "It is not a question as to the right of a negro or of any number of negroes to sit on a grand jury that the Fourteenth Amendment to the Constitution was intended to provide for, but it was intended, where a negro was on trial, to prevent discrimination against the negro race in the formation of the grand jury which presented the indictment; and only in case negroes are intentionally excluded from the jury is he denied

the equal protection of the laws. It was never intended by the Fourteenth Amendment to guarantee a negro defendant a full negro grand jury, nor to guarantee him any particular number of grand jurors; but it was intended to prevent their intentional exclusion from the grand jury."

There is no constitutional provision requiring negroes to be drawn or serve as jurors upon the trial of negroes, nor has a negro any constitutional right to demand negroes upon his jury. The evidence upon the trial upon an issue whether jury commissioners purposely and intentionally refuse to select any persons of African descent must show that there has been an intentional discrimination against a negro defendant and against his race in the selection of a grand and petit jury. *Parker v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 1066.

(c) **Must Be Given Opportunity to Prove Exclusion.** — When a defendant of the negro race has duly and distinctly alleged, in the motion to quash an indictment, that all persons of the African race were excluded because of their race and color from the grand jury which found the indictment, and has asked leave of the court to introduce witnesses, and has offered to introduce witnesses to prove and sustain that allegation, he has been denied the equal protection of the law by the refusal of the court to hear any evidence upon the subject and the

overruling of the motion without investigating whether the allegation was true or false.

Carter v. Texas, (1900) 177 U. S. 448, wherein the court said: "Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving

as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States." *Reversing* (1898) 39 Tex. Crim. 345.

(d) *Sufficiency of Allegations of Exclusion.* — The allegation that colored citizens were excluded from service on the jury, and that only white citizens were selected, was held too vague and indefinite to constitute the basis of an inquiry by the court whether the sheriff had not disobeyed its order by selecting and summoning petit jurors with intent to discriminate against the race of the accused.

Bush v. Kentucky, (1882) 107 U. S. 117.

Affidavit on information and belief. — A motion to quash an indictment for the reason that the commissioners discriminated against all negroes on account of their race, in select-

ing the lists of names for jury duty, cannot be sustained on an affidavit stating that the facts set up in the motion were true "to their best knowledge, information and belief." *Tarrance v. Florida*, (1903) 188 U. S. 521.

(2) *Separate Schools for White and Colored Children.* — State statutes providing for the education of white and colored children in separate schools are valid.

Per Clifford, J., concurring in *Hall v. De Cuir*, (1877) 95 U. S. 504. See also the following cases: *Bertonneau v. Board of Directors*, (1878) 3 Woods (U. S.) 177, 3 Fed. Cas. No. 1,361; *Union County Ct. v. Robinson*, (1871) 27 Ark. 116; *State v. Gray*, (1883) 93 Ind. 303; *State v. Grubb*, (1882) 85 Ind. 213; *Cory v. Carter*, (1874) 48 Ind. 327; *Reynolds v. Board of Education*, (1903) 66 Kan. 672; *Board of Education v. Tinnon*, (1881) 26 Kan. 1; *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160; *People v. Board of Education*, (1869) 18 Mich. 400; *Chrisman v. Brookhaven*, (1892) 70 Miss. 477; *Lehew v. Brummell*, (1890) 103 Mo. 546; *People v. Easton*, (Supm. Ct. 1872) 13 Abb. Pr. N. S. (N. Y.) 159; *Dallas v. Fostick*, (Supm. Ct. Gen. T. 1896) 40 How. Pr. (N. Y.) 249; *People v. Gallagher*, (1883) 93 N. Y. 438, *affirming* (Brooklyn City Ct. Gen. T. 1882) 11 Abb. N. Cas. (N. Y.) 187; *Puitt v. Gaston County*, (1886) 94 N. Car. 709; *State v. Board of Education*, (1876) 7 Ohio Dec. (Reprint) 129, 1 Cinc. L. Bul. 139; *State v. McCann*, (1871) 21 Ohio St. 203; *Martin v. Board of Education*, (1896) 42 W. Va. 514.

Separate education of white and colored children does not deny to the colored children the equal protection of the laws, if there is a school in the district for the education of colored children affording the same educational advantages as are afforded at the white school. But if the colored school is so remote from the residence of a colored child that he could not attend it without going an unreasonable and oppressive distance, and he is thus placed at a material disadvantage with his white neighbor, then he is entitled to admission in the white school, and his ex-

clusion therefrom is a denial and a deprivation of his constitutional right. *U. S. v. Buntin*, (1882) 10 Fed. Rep. 735.

When there exists a law providing for the education of colored children in separate schools, such children may be excluded from the schools established for white children, but unless such separate schools are in fact maintained, all children of the school district, whether white or black, have a right to become pupils in any school organized under the laws of the state. *Ward v. Flood*, (1874) 48 Cal. 36.

A statute which prescribed the duties of school directors, and directed that they should not make any distinction on account of race or color in expending the public money, is in harmony with the spirit of the Fourteenth Amendment of the United States Constitution, and school directors cannot deny a colored child admission on account of his color to the common school established for the separate instruction of white children, and assign him to a department of the school established by them in an adjacent building for the separate instruction of the negro race. *Kaine v. Com.*, (1882) 101 Pa. St. 490.

Section 50 of the Nevada School Law (Stat. 1867, p. 95) which provided that negroes shall not be admitted into the public schools, but the board of trustees may establish a separate school for their education, and use the public school funds for the support of the same, was held to be unconstitutional in so far as it excludes negroes from the schools. *State v. Duffy*, (1872) 7 Nev. 342, wherein the court said that while school trustees cannot legally deny to any negro

resident person of proper age an equal participation in the benefits of the common schools, yet it is entirely within their power to send all blacks to one school and all whites

to another; or, in other words, to make such classification, whether based on age, sex, race, or any other existent condition as may seem to them best.

(3) *Suspending High School for Colored Children.* — The action of a local board of education in suspending temporarily and for economic reasons a high school for colored children is not a sufficient reason why the board should be restrained by injunction from maintaining an existing high school for white children, when the evidence in the record would not permit a finding that it had proceeded in bad faith, or had abused the discretion with which it was invested by the statute under which it had proceeded, or had acted in hostility to the colored race.

Cumming v. Richmond County Board of Education, (1899) 175 U. S. 545, wherein the court said that while "the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respec-

tive states, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Affirming Board of Education v. Cumming*, (1898) 103 Ga. 641.

(4) *Distribution of School Fund Between White and Colored Races.* — Statutes authorize a municipal corporation to establish two school systems in the city, the schools for white children being supported by the taxes collected from the white people, and the schools for the colored children being supported by the taxes collected from the colored people, and authorize the issue of bonds for the building of public school houses to be used exclusively by white children, the law providing that only white people and their property should be taxed to pay these bonds and the accruing interest thereon. Such a school system denies to colored children the equal protection of the laws, when the practical result of this discrimination against the colored children in the distribution of the school fund raised by taxation has been to give the white children two excellent school houses, excellent school facilities, eighteen teachers, and a school session of nine to ten months in a year, and on the other hand the colored children had only one inferior school house, three teachers, school facilities of every kind very inferior to those of the white children, and a school session of about three months in each year.

Claybrook v. Owensboro, (1883) 16 Fed. Rep. 297, (1884) 23 Fed. Rep. 634. See also *Davenport v. Cloverport*, (1896) 72 Fed. Rep. 689.

A Kentucky Act, entitled "An Act to establish a uniform system of common schools for the colored children of this commonwealth," was held to be unconstitutional since negro children of the state were excluded by implication from any share of the proceeds of the common school fund which the Constitution set apart, also from the tax levied annually on the property of white persons for the purposes of schools. *Dawson v. Lee*, (1885) 83 Ky. 49. See *Marshall v. Donovan*, (1874) 10 Bush (Ky.) 681.

A North Carolina statute allowing the assessment on the polls of one color and on property owned by persons of the same race, exclusively to be applied to the education of the children of that race, discriminates between the races by allowing the tax paid by one to be applied exclusively to the education of that race, and is therefore unconstitutional; but it does not apply to a law requiring the two races to be educated in separate schools under equal advantages, nor to prohibitions against marriages between the races. *Puitt v. Gaston County*, (1886) 94 N. Car. 709.

(5) *Separate Coaches for White and Colored Races.* — A state statute which provides for separate railway carriages for the white and colored races does not deny the equal protection of the law.

Plessy v. Ferguson, (1896) 163 U. S. 540, wherein the court said: "The object of this amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." See also *U. S. v. Dodge*, (1877) 1 Tex. L. J. 47, 25 Fed. Cas. No. 14,976; *Ohio Valley R. Co. v. Lander*, (1898) 104 Ky. 431; *Chesapeake, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 160; *Chilton v. St. Louis, etc., R. Co.*, (1893) 114 Mo. 88; *Chesapeake, etc., R. Co. v. Wells*, (1887) 85 Tenn. 613; *Smith v. Chamberlain*, (1892) 38 S. Car. 529.

Equal accommodation for colored people. — This amendment secures to colored people equal accommodations in public conveyances. While social rights and privileges are not within the protection of this amendment, the rights and privileges to be afforded to passengers in public conveyances are not within that class. *Coger v. North Western Union Packet Co.*, (1873) 37 Iowa 155. See also *Houck v. Southern Pac. R. Co.*, (1888) 38 Fed. Rep. 226.

(6) *Prohibiting Marriage of White with Colored Person.* — A state law forbidding any white or colored person from marrying a person of the opposite color, and declaring such marriage void, does not deny the equal protection of the laws.

Ex p. Kinney, (1879) 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825. See also *State v. Tutty*, (1890) 41 Fed. Rep. 753; *Ex rel Hobbs*, (1871) 1 Woods (U. S.) 537, 12 Fed. Cas. No. 6,550; *Ex p. Francois*, (1879) 3 Woods (U. S.) 367, 9 Fed. Cas. No. 5,047; *Dodson v. State*, (1895) 61 Ark. 57; *Green*

A Kentucky statute which requires railroads to provide separate accommodations for white and colored passengers, but makes no discrimination in favor of white passengers, since any discrimination in the quality, conveniences, or accommodations in the cars or compartments set apart for white and colored persons is prohibited, does not deny to colored people the equal protection of the laws. *Anderson v. Louisville, etc., R. Co.*, (1894) 62 Fed. Rep. 48.

Separate accommodations on street cars. — A Louisiana statute providing "that all street railway companies carrying passengers in their cars in this state shall provide equal but separate accommodations for the white and colored races by providing two or more cars, or by dividing their cars by wooden or wire screen partitions, so as to secure separate accommodations for the white and colored races," was within the power of legislation. *State v. Pearson*, (1903) 110 La. 391.

A United States court cannot take jurisdiction of an action brought by a colored person against a railroad company for an alleged deprivation of accommodations equal to those given to white people, when there is no law of the state justifying the action of the company. If the courts of the state shall sustain as legal this discrimination on account of race and color, the plaintiff and others of like condition are not without remedy, but may have the question passed upon by the Supreme Court. *Smoot v. Kentucky Cent. R. Co.*, (1882) 13 Fed. Rep. 341.

v. State, (1877) 58 Ala. 191, *overruling Burns v. State*, (1872) 48 Ala. 195; *State v. Gibson*, (1871) 36 Ind. 389; *Lonas v. State*, (1871) 3 Heisk. (Tenn.) 287; *Frasher v. State*, (1877) 3 Tex. App. 263, *affirmed* (1880) 9 Tex. App. 145.

(7) *Exclusion of Negroes from Homestead Law.* — A state homestead law is unconstitutional in so far as it excludes negroes from its benefits.

Custard v. Poston, (Ky. 1886) 1 S. W. Rep. 434, *following Eubank v. Eubank*, (1885) 7 Ky. L. Rep. 295.

(8) *Imposing Heavier Punishments for Inter-racial Offenses.* — State statutes, prohibiting the offense of adultery and fornication, do not deny the equal protection of the laws by imposing a heavier penalty when the two sexes are of different races than when the two sexes are of the same race. Whatever

discrimination is made in the punishment prescribed is directed against the offense designated, and not against the person of any particular color or race.

Pace v. Alabama, (1882) 106 U. S. 585, wherein the court said: "Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property, but that in the administration

of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment." *Affirming* (1881) 69 Ala. 231. See also *Green v. State*, (1877) 58 Ala. 190, *overruling* *Burns v. State*, (1872) 48 Ala. 195; *Ford v. State*, (1875) 53 Ala. 150.

(9) *Bastardy Law Relating Only to White Women*. — A statute provides that any magistrate, upon receiving information that "any white woman" has given birth to an illegitimate child, "may issue his warrant" for her apprehension, and when she is brought before him, "require her to give security to indemnify the county from any charge that may accrue by means of such child, and upon neglect or refusal shall commit her to the custody of the sheriff of the county, to be by him kept until she shall give such security." But if she discloses on oath the father of the child, then it is made the duty of the magistrate "to discharge her," and to cause the father to be arrested and "to give security in the sum of eighty dollars to indemnify the county from all charges that may arise from the maintenance of the child." By another section, every constable who may have knowledge of "any white woman" having an illegitimate child is required "to give information thereof to some justice of the peace of the county." Proceedings are thereupon had against the person charged with being the father. Such a statute does not deny to any one the equal protection of the laws.

Pinkard v. State, (1887) 67 Md. 370, in which case the court said: "As between fathers, whether white or colored, no distinction whatever is made, and how can the fact that the law does not extend to negro or colored mothers be regarded as a denial to them of the 'equal protection of the laws,' as these terms have been defined by the authorities cited? It surely will not be con-

tended that there is discrimination against them because they are not embraced in the terms of a penal statute or of such a law as this. Nor do we perceive how the white mother can be said to be discriminated against by a law, all the burthens of which she can escape by her own voluntary act of simply disclosing the father of her child, whether he be white or colored."

(10) *Statutes and Ordinances Directed Against Chinese* — (a) *Mode of Enforcing Unobjectionable Ordinances*. — To the contention that a statute prohibiting the exposure of gambling tables in a room protected in any manner to make it difficult of access or ingress to police officers or the visiting of such a room was unconstitutional because it was enforced against Chinese only, the court said: "The averment in the case at bar is that the ordinance is enforced 'solely and exclusively against persons of the Chinese race and not otherwise.' There is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced. No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the state, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the

ordinance was which was passed on in the Yick Wo case, but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a federal court is invoked to interfere with the course of criminal justice of a state."

Ah Sin v. Wittman, (1905) 198 U. S. 507.

(b) **Regulating Laundries** — *aa. PROHIBITING AT CERTAIN HOURS WITHIN PRESCRIBED LIMITS.* — A municipal ordinance which prohibits the carrying on of the business of washing and ironing clothes during certain hours of the night, but permits the fluting, polishing, bluing, and wringing of them, does not make an unlawful discrimination between persons engaged in the same business. It is not discriminating legislation in an invidious sense, that branches of the same business from which danger is apprehended are prohibited during certain hours of the night, whilst other branches involving no such danger are permitted.

Soon Hing v. Crowley, (1885) 113 U. S. 709, wherein the court said that the validity of a statute or of a municipal ordinance cannot be determined by the motives of the legislators or supervisors, except as they may be disclosed on the face of the acts or inferable from their operation, considered with reference to the condition of the country and existing legislation. Motives, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactment, and even if the motive of municipal supervisors in adopting an ordinance were to make an unlawful discrimination, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against a particular class.

A municipal ordinance prohibiting the carrying on of washing and ironing of clothes in public laundries and wash houses within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock of the following day, is purely a police regulation, and is not a violation of any substantial right of an individual. *Barbier v. Connolly*, (1885) 113 U. S. 30.

A city ordinance which makes it an offense to keep a laundry, wherein clothes are cleansed for hire, within the limits of the larger part of a city, without regard to the character of the structures or the appliances used for the purpose, or the manner in which the occupation is carried on, violates this clause. *In re Sam Kee*, (1887) 31 Fed. Rep. 680. See also *In re Hong Wah*, (1897) 82

Fed. Rep. 623; *The Stockton Laundry Case*, (1886) 26 Fed. Rep. 611.

A municipal ordinance declaring that "no person or persons owning or employed in the public laundries or public wash houses provided for in section 1 of this order shall wash or iron clothes between the hours of ten o'clock P. M. and six o'clock A. M., nor upon any portion of that day known as Sunday," and declaring it to be unlawful for any person to establish, maintain, or carry on the business of a public laundry or wash house, where articles are cleansed for hire, within certain named limits, without having first obtained a certificate from the health officer that the premises are sufficiently drained, and that the business can be carried on without injury to the sanitary condition of the neighborhood, and a certificate from the board of fire wardens, that the heating appliances are in good condition, and that their use is not dangerous to the surrounding property, does not deny to any person the equal protection of the laws. *Ex p. Moynier*, (1884) 65 Cal. 34, wherein the court said: "The order is not discriminating and special in any such sense as to make it repugnant to the Constitution. Its terms apply to all persons establishing, maintaining, or carrying on the business of a public laundry or public wash house, where articles are cleansed for hire, within certain limits. It is no more special and discriminating than the prohibition of the storage of powder, or the slaughtering of animals, both of which may be necessary to be done, but for the regulation of which the power is unquestioned."

bb. DISCRETION IN OFFICERS TO PERMIT USE OF WOODEN BUILDINGS. — A municipal ordinance which vests in the supervisors the right to grant or withhold their assent to the use of wooden buildings as laundries, not a discretion to be exercised upon the consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons, is a denial of the equal protection of the laws when

it is made to appear that the petitioners have complied with every requisite deemed by law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire or as a precaution against injury to the public health, and no reason whatever except the will of the supervisors is assigned why they should or should not be permitted to carry on in the customary manner their harmless and useful occupation.

Yick Wo v. Hopkins, (1886) 118 U. S. 366.

(c) **Discriminating Against Mongolians as Jurors.** — A statute providing that “every qualified elector of the state * * * is a qualified juror of the county in which he resides,” does not deprive a Mongolian defendant of any right secured by the Constitution, laws, or treaty. The Mongolian or yellow race are denied the right to serve as jurors because they are aliens, and not on account of their color. There is no discrimination in the statute against any person because of his race or color.

State v. Ah Chew, (1881) 16 Nev. 58.

(d) **Separate Schools for Chinese Children.** — The maintenance of separate schools for children of Chinese descent is not a discrimination against such children.

Wong Him v. Callahan, (1902) 119 Fed. Rep. 381, wherein the court said: “Concerning the authority of the state over matters pertaining to public schools within its limits, and the validity of legislation of the character of that under consideration, it is well settled that the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the Fourteenth Amendment to the Constitution,

provided the schools so established make no discrimination in the educational facilities which they afford. When the schools are conducted under the same general rules, and the course of study is the same in one school as in the other, it cannot be said that pupils in either are deprived of the equal protection of the law in the matter of receiving an education.”

(e) **Prohibiting Employment by Corporations.** — A state constitution provides that “no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision.” In obedience to this mandate, the legislature passed an Act entitled “An Act to amend the Penal Code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations.” The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive those now here from the state, and prevent others from coming hither, and this deprives them of the equal protection of the laws.

In re Tiburcio Parrott, (1880) 1 Fed. Rep. 499.

(f) **Queue Ordinance.** — A “queue ordinance,” declaring that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall immediately upon his arrival at the jail have the hair of his head cut or clipped to the uniform

length of one inch from the scalp, designed to reach the queues of the Chinese, and not enforced against any other person, was held to be void.

Ho Ah Kow v. Nunan, (1879) 5 Sawy. (U. S.) 552, 12 Fed. Cas. No. 6,546, wherein the court said: "Where an ordinance, though general in its terms, only operates upon a special race, sect, or class, it being universally understood that it is to be enforced only against that race, sect, or class, we may justly conclude that it was the intention of the body

adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete."

(g) **Prohibiting Visiting Gambling Place in "Chinese Quarter."**—A municipal ordinance prohibiting any person from visiting any gambling place within certain limits, was held to be valid although the limits as defined were generally designated and known as a "Chinese quarter," yet the fact being that white men as well as Chinese lived and owned property within those limits; moreover, any person, without regard to residence, race, or color, found visiting any gambling place therein was liable to arrest and punishment.

In re Ah Kit, (1890) 45 Fed. Rep. 794.

(h) **Inoculation During Existence of Bubonic Plague.**—Municipal ordinances, adopted at a time when the bubonic plague was supposed to exist, providing that no Chinese persons should depart from the city without being inoculated, were held void as not based upon any established distinction in the conditions that are supposed to attend this plague, or the persons exposed to its contagion, but as being boldly directed against the Asiatic or Mongolian race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual. The conditions of a great city frequently present unexpected emergencies affecting the public health, comfort, and convenience. Under such circumstances, officers charged with duties pertaining to this department of the municipal government should be clothed with sufficient authority to deal with the conditions in a prompt and effective manner. Measures of this character, having a uniform operation, and reasonably adapted to the purpose of protecting the health and preserving the welfare of the inhabitants of a city, are constantly upheld by the courts as valid acts of legislation, however inconvenient they may prove to be, and a wide discretion has also been sanctioned in their execution. But when the municipal authority has neglected to provide suitable rules and regulations upon the subject, and the officers are left to adopt such methods as they may deem proper for the occasion, their acts are open to judicial review, and may be examined in every detail to determine whether individual rights have been respected in accordance with constitutional requirements.

Wong Wai v. Williamson, (1900) 103 Fed. Rep. 6.

(i) **Prohibiting the Removal of Remains of Deceased Persons.**—A statute, entitled "An Act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," provides that "it shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or

remains of any deceased person, unless the person or persons so doing shall first obtain from the board of health, health officer, mayor, or other head of the municipal government of the city, town, or city and county where the same are deposited, a permit for said purpose," for which permit the sum of ten dollars is to be paid, does not violate this clause. If the provisions of the Act affect a larger number of Chinese than of any other class, it is not on account of any discriminations made by the law, but only because under their customs there is a much larger number of disinterments and removals by them than by any others.

In re Wong Yung Quy, (1880) 2 Fed. Rep. 624.

(j) **Prohibiting Fishing by Chinese Aliens.** — A California statute which provides that "all aliens incapable of becoming electors of this state are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shellfish of any kind, for the purpose of selling or giving to another person to sell," is void. To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to punishments, pains, and penalties other than and entirely different from those to which others are subjected, and it is to deny to them the equal protection of the laws.

In re Ah Chong, (1880) 2 Fed. Rep. 734.

(k) **Exclusion from Right to Testify.**

The exclusion of Chinamen from the right to testify in the state courts does not violate this amendment, as it is within the power of a state legislature to declare who shall be

competent as witnesses in courts of justice and to regulate the production of evidence. *People v. Brady*, (1870) 40 Cal. 198; *People v. McGuire*, (1872) 45 Cal. 56.

(l) **Covenant Against Conveying to Chinese Persons.**

A covenant in a deed: "It is also understood and agreed by and between the parties hereto, their heirs and assigns, that the party of the first part shall never, without the consent of the party of the second part, his heirs or assigns, rent any of the buildings or ground owned by said party of the first part, and fronting on said East Main street, to a Chinaman or Chinamen," is void and should not be enforced in any court — certainly not in a court in the United States. *Gandolfo v. Hartman*, (1892) 49 Fed. Rep. 181, in which case the court said: "It would be a very narrow construction of the constitutional amendment in question and of the

decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other. This would seem to be very clear."

j. **RELATING TO SUFFRAGE.** — A state constitution which requires the payment of taxes and the ability to read a section of the Constitution, or to give a reasonable interpretation thereto, as a qualification to vote, and denies to one who has been convicted of an infamous crime the right to vote, and statutes enacted for the purpose of carrying out these provisions, do not on their face discriminate between the races, and do not deny the equal protection of the law when it has not been shown that the actual administration of the Constitution and statutes is evil, but only that evil is possible under them.

Williams v. Mississippi, (1898) 170 U. S. 225, wherein the court said that this amendment forbids, so far as civil and political rights are concerned, discriminations by the general government or by the states against any citizen because of his race. But to justify the removal from a state court to a federal court of a cause in which such rights are alleged to be denied, such denial must be the result of the constitution or laws of the state, not of the administration of them.

Registration of voters.—A statutory provision of *Maryland* which provided that no person should be entitled to registration for the purposes of election who comes into the state from another state until one year after his intent to become a legal voter shall be evidenced by an entry of intention on the book of record kept by the county clerk, was held not to be unconstitutional. *Pope v. Williams*, (1903) 98 Md. 59, *affirmed* (1904) 193 U. S. 621, the court saying that the Act does not discriminate against any person or class of persons, but merely establishes a rule of evidence in respect to a person coming into the state.

Dropping delinquent poll taxables.—An Act of *Delaware* which provided that, in the case of persons assessed and liable to pay poll-taxes, upon the return of the collector in

form and verified as therein provided, it shall be the duty of the levy court "to allow said collector, as delinquencies, the taxes uncollected by him, and the names of such delinquents shall be dropped from the assessment list by the levy court, and shall not be placed thereon again for a period of twelve months from and after the date of such allowance," was held to be constitutional, the court saying: "It seems not necessary to say more than this in regard to the objection to the legislation on the ground of its alleged hostility to the Fourteenth * * * Amendment of the Constitution of the United States,—that in this state every man, rich or poor, black or white, has the equal protection of the laws at all times, whether he be a legal voter or not; the ability to vote being no more necessary to secure that protection in his case than in that of women and minors, who, and whose property, are as much under the shield of the law's protection as is that of any man, great or small. A delinquent taxable is as much safeguarded in his personal rights as is he who owns houses and land. The notion that the right to exercise the suffrage is, in Delaware, necessary for the protection of one's person or property, is purely fanciful, and without any reality of reason." *Friesleben v. Shallcross*, (1890) 9 Houst. (Del.) 3.

k. RESIDENTS AND NONRESIDENTS (see also *Game and Fish Laws*—*Requiring License Fee of Nonresidents*, *infra*, p. 603) — (1) *Right of Nonresident to Sue*.—To refuse to a person, though not a citizen of the state, the right to maintain an action against a person found within its limits, would be to deny to him the equal protection of the laws.

Steed v. Harvey, (1898) 18 Utah 373, in which case the court said that this provision "secures to any person within its jurisdiction, though he may not be a citizen or even a resident, the protection of its laws equally with its own citizens, and this protection must be construed to mean protection to life, liberty, and property, and the term property must be held to include money due for the violation of a contract."

Damages for defects in highways.—A statute of *Maine* which provided that "no

person shall recover of any city or town in this state, damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway, or bridge, provided the said damage be done to or claimed by any person, who was at the time said damage was done a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country," was held to be unconstitutional. *Pearson v. Portland*, (1879) 69 Me. 278.

(2) *Requiring Bond in Attachment Against Resident*.—A territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property, which in case of an attachment against a resident requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, whilst it makes no such requirement in the case of an attachment against a non-resident, does not amount to a denial of the equal protection of the laws.

Central L. & T. Co. v. Campbell Commission Co., (1899) 173 U. S. 97, *reversing* (1897) 5 Okla. 396.

(3) *Suits on Attachment Bonds Given by Nonresidents*.—Where a national bank, located in a foreign state, desired to obtain process of attachment in a

certain state, and, as a condition precedent to the issuing of the writ, gave bond as required by the law of that state, and thereupon the writ issued in its favor, a statute which provides that in a suit on an attachment bond if the principal be a nonresident it shall be sufficient to serve a copy of the petition and process on the security, and the action may thereupon proceed against both principal and security, became a part of the bond as fully as if expressly incorporated therein, and in a subsequent suit on such bond service on the security was sufficient. A proceeding under such a statute does not conflict with the Fourteenth Amendment of the United States Constitution.

Continental Nat. Bank v. Folsom, (1887) 78 Ga. 449.

(4) *Discrimination Against Nonresident as to Issuing a Capias.* — A statute which discriminates between residents and nonresidents in regard to issuing a *capias ad respondendum* against them is unconstitutional.

Black v. Seal, 6 Houst. (Del.) 541.

(5) *Higher Penalty on Residents of a Town.* — The legislature has the constitutional power to inflict upon resident owners of stock running at large in a town a higher penalty than on nonresident owners.

Jones v. Duncan, (1900) 127 N. Car. 118, *oiting State v. Tweedy*, (1894) 115 N. Car. 704; *Broadfoot v. Fayetteville*, (1897) 121 N. Car. 418.

l. RAILROAD COMPANIES — (1) *Regulation of Rates* — (a) **Must Admit of Just Compensation.** — A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

Smyth v. Ames, (1898) 169 U. S. 526, *affirming Ames v. Union Pac. R. Co.*, (1894) 64 Fed. Rep. 165.

General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation when not forbidden by charter contracts, do not necessarily take away from the corporation owning or operating a railroad with a state the equal protection of the laws. *Railroad Commission Cases*, (1885) 116 U. S. 335, *reversing Farmers' L. & T. Co. v. Stone*, (1884) 20 Fed. Rep. 270, and *Illinois Cent. R. Co. v. Stone*, (1884) 20 Fed. Rep. 468.

Legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of the companies engaged in the carrying business deprives the companies of the equal protection of the laws. *St. Louis, etc., R. Co. v. Gill*,

(1895) 156 U. S. 657. But see *Wilder v. Chicago, etc., R. Co.*, (1888) 70 Mich. 382, that the reasonableness of legislative regulation of railroad rates is a matter for the legislature to determine, and not the courts.

The equal protection of the laws forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or for the public. *Reagan v. Farmers' L. & T. Co.*, (1894) 154 U. S. 390.

A state law or regulation establishing rates for the transportation of persons or property, such as will not admit of the carrier earning such a compensation as under all the circumstances of the case is just to it and the public, operates to deny to it the equal protection of the law. *Wallace v. Arkansas Cent. R. Co.*, (C. C. A. 1902) 118 Fed. Rep. 424.

(b) **Prohibiting Greater Rate for Short Haul.** — A state, by enacting a rule of action for railroad companies, forbidding a greater rate of charges for a shorter than for a longer distance, does not deny to a railroad the equal protection of the laws.

Louisville, etc., R. Co. v. Kentucky, (1902) 183 U. S. 512, *affirming* (1899) 106 Ky. 633.

(c) **To Keep Mileage Tickets at Lower than General Rates.** — A statute requiring railroads to keep for sale one-thousand-mile tickets at certain rates, which rates are lower than the general rates, is a denial of the equal protection of the laws.

Lake Shore, etc., R. Co. v. Smith, (1890) 173 U. S. 684, reversing Smith v. Lake Shore, etc., R. Co., (1897) 114 Mich. 460. See also Beardale v. New York, etc., R. Co., (1900) 162 N. Y. 230, reversing (1897) 15 N. Y. App. Div. 251.

(d) **Lower Rates for Public School Pupils.** — The constitutional provision was held not to be violated by a statute which requires street railway companies to carry pupils of the public schools, in their regular course going from their homes to the schools and returning therefrom, at rates not exceeding half the regular fare charged by the company for the transportation of other passengers between the same points, where it was contended that the statute was repugnant to the Fourteenth Amendment of the Constitution of the United States, in that it did not apply to all the street railway companies in the commonwealth, nor to all persons using street railways, nor even to all pupils using street railways, but only to pupils of the public schools, also that there was a discrimination because a certain railway company was left exempt from the provision of the statute.

Com. v. Interstate Consol. St. R. Co., (1905) 187 Mass. 436, the court saying: "The constitutional principle invoked in this contention does not require that the same laws shall be enacted for all street railway companies in different parts of a state. * * * The situation of the lines of the Boston Elevated Railway Company, in the midst of a dense population, is so different from that of other lines in the state, and their fitness for use by children in going to and from the public schools might be found by the legislature to be so unlike that of street railways generally in the state, as properly to call for

an exemption from the law established for others. We cannot say that the legislature had no power to make this distinction, founded on differences in conditions. The most important and difficult question in the case is whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reasons for making a distinction, the provision would be unconstitutional and void. * * * In this case the selection of a class is not entirely arbitrary."

(e) **Distinguishing Between Railroads** — *aa.* **ACCORDING TO LENGTH OF ROAD.** — A state statute which classifies railroads according to their length, and fixes a maximum rate of charges for the carriage of passengers in each class, is not unconstitutional.

Dow v. Beidelman, (1888) 125 U. S. 680, wherein the court said: "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a

previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws." *Affirming* (1887) 49 Ark. 325.

bb. **BASED ON GROSS EARNINGS AND LOCALITY.** — A statute of Michigan which fixed a maximum rate on the different railroads of the state for the transportation of passengers, based upon their gross earnings per mile, and which distinguished between railroads located in the upper peninsula and those in the lower peninsula, was held to be constitutional.

Wellman v. Chicago, etc., R. Co., (1890) 83 Mich. 592, the court saying: "A classification according to the amount of business done per mile seems to me to be the fairest and most reasonable classification, if rail-

roads are to be classed at all, in the fixing of the maximum rates; and this method of classification is not unusual, and has been sustained in a variety of cases."

cc. ACCORDING TO TIME OF CONSTRUCTION. — A statute prescribing the maximum rates for the transportation of freight by railroads within the state, which provides that "all railroads or parts thereof, which have been built in this state since the first day of January, 1889, or may be built before the thirty-first day of December, 1899, shall be exempt from the provisions of this Act until the thirty-first day of December, 1899," is not invalid for making an arbitrary classification. The principle of classification adopted by the legislature, whether wise or unwise, is within its power. To divide railroads into two classes, placing in the one all that have been constructed and in operation for a length of time, and whose business must therefore be presumed to have been thoroughly established, and in the other all only recently constructed, is clearly not a mere arbitrary distinction; and this notwithstanding it may be that one of the recently constructed roads is so fortunate as to have immediately secured a large business.

Ames v. Union Pac. R. Co., (1894) 64 Fed. Rep. 165.

Held invalid. — Legislation affecting railroads cannot discriminate between railroads themselves, and a statute prescribing regulations, and declaring that "none of its provisions" shall apply to any railroad then being "constructed," or which might thereafter be "begun and constructed in the state," until "ten years from and after its completion," denies to the older railroad the

equal protection of the laws. If the legislature can thus discriminate between new and old roads, it can assume any other arbitrary basis in support of invidious legislation, and in this way oppress one interest for the benefit of another. *Louisville, etc., R. Co. v. Railroad Commission*, (1884) 19 Fed. Rep. 695, wherein the court said that a state cannot "distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them."

dd. RAILROAD "GUILTY OF EXTORTION." — A statute which empowers the railroad commission, upon finding that a railroad has been "guilty of extortion," to fix a lower rate for that road alone and for none of the others is invalid. The effect of the determination is individual, and by not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its rivals, it is deprived of the equal protection of the laws.

Louisville, etc., R. Co. v. McChord, (1900) 103 Fed. Rep. 216, *reversed* on jurisdictional grounds, (1902) 183 U. S. 483.

(2) Requiring Railroads to Furnish Free Transportation to Shippers. — An Act requiring railroads to furnish free transportation to shippers of stock in certain cases is void as depriving the railroads of the equal protection of the laws.

Atchison, etc., R. Co. v. Campbell, (1900) 61 Kan. 439.

(3) Fellow-servant Law. — A state statute which authorizes the recovery of damages for an injury suffered by an employee because of the negligent act of a fellow servant, when it applies only to railroad corporations, does not deny the equal protection of the laws. It is not invalid as discriminating in favor of individual employers.

Tallis v. Lake Erie, etc., R. Co., (1899) 175 U. S. 351. See also *Minneapolis, etc., R. Co. v. Herrick*, (1888) 127 U. S. 210; *Cincinnati, etc., R. Co. v. Thiebaud*, (C. C. A.

1900) 114 Fed. Rep. 918; *Georgia R., etc., Co. v. Miller*, (1892) 90 Ga. 571; *Indianapolis Union R. Co. v. Houlihan*, (1901) 157 Ind. 494; *Pittsburgh, etc., R. Co. v. Mont-*

gomery, (1898) 152 Ind. 4; Rayburn v. Central Iowa R. Co., (1888) 74 Iowa 637; Pierce v. Central Iowa R. Co., (1887) 73 Iowa 140; Bucklew v. Central Iowa R. Co., (1884) 64 Iowa 603; McAunich v. Mississippi, etc., R. Co., (1866) 20 Iowa 338; Missouri Pac. R. Co. v. Mackey, (1888) 33 Kan. 298; Missouri Pac. R. Co. v. Haley, (1881) 25 Kan. 35; Herrick v. Minneapolis, etc., R. Co., (1883) 31 Minn. 11, (1884) 32 Minn. 435; Powell v. Sherwood, (1901) 162 Mo. 605; Froelich v. Toledo, etc., R. Co., (1903) 24 Ohio Cir. Ct. 359; Campbell v. Cook, (1894) 86 Tex. 630; Ditherner v. Chicago, etc., R. Co., (1879) 47 Wis. 138.

The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to legislation on the ground of its making an unjust discrimination, when it meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. Missouri Pac. R. Co. v. Mackey, (1888) 127 U. S. 207.

(4) *Liability for Injuries to Passengers.* — A statute providing that “every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice,” does not deny to a railroad company the equal protection of the laws. Statutes imposing an additional, or even absolute, liability on railroads for injuries to passengers or property are not repugnant to the Constitution of the United States.

Clark v. Russell, (C. C. A. 1899) 97 Fed. Rep. 900.

(5) *Liability on Failure to Fence Track* — (a) *Absolute Liability for Injury to Stock.* — A statute requiring railroad corporations to erect fences where their roads pass through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle, and other animals from going on the roads, and making them liable in double the amount of damages which shall be done to horses, cattle, mules, or other animals occasioned by the failure to construct such fences or cattle guards, does not deny to any railroad the equal protection of the law. Each company is subject to the same liability, and from each the same security is exacted, by the erection of fences, gates, and cattle guards, when its road passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances.

Missouri Pac. R. Co. v. Humes, (1885) 115 U. S. 518. See also Sullivan v. Oregon R., etc., Co., (1890) 19 Oregon 319.

In Wadsworth v. Union Pac. R. Co., (1893) 18 Colo. 600, followed by Sweetland v. Atchison, etc., R. Co., (1896) 22 Colo. 220, it

was held that a Colorado statute which imposed an unconditional liability on railroads for killing live stock was invalid as the fencing of railroads was not required, and consequently there was no foundation for the penalty.

(b) *Double Damages for Injury to Stock.* — A statute which provides that if a railroad company fails to fence its lines against live stock running at large, it shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, and that if the corporation neglects to pay the value or damage done to such stock, within

thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officers of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto, does not deny the equal protection of the laws.

Minneapolis, etc., R. Co. v. Beekwith, (1889) 129 U. S. 27. See also Tredway v. Sioux City, etc., R. Co., (1876) 43 Iowa 527.

(c) *Double Damages for Injury to Crops.* — A state statute which gives to a party double damages where his crops are injured as a result of defective fencing along a railroad, through which stock passed into the plaintiff's premises, is a constitutional exercise of the legislative power.

Kingsbury v. Missouri, etc., R. Co., (1900) 156 Mo. 379, the court saying that the constitutionality of the statute had been often questioned and had been invariably sustained by the courts, and citing *Gorman v. Pacific R. Co.*, (1858) 26 Mo. 441; *Trice v. Hannibal, etc., R. Co.*, (1872) 49 Mo. 438; *Barnett v. Atlantic, etc., R. Co.*, (1878) 68 Mo. 56; *Cummings v. St. Louis, etc., R. Co.*, (1879) 70 Mo. 570; *Speelman v. Missouri Pac. R. Co.*, (1880) 71 Mo. 434; *Humes v. Missouri*

Pac. R. Co., (1884) 82 Mo. 221; *Phillips v. Missouri Pac. R. Co.*, (1885) 86 Mo. 540; *Hinea v. Missouri Pac. R. Co.*, (1885) 86 Mo. 629; *Hamilton v. Missouri Pac. R. Co.*, (1885) 87 Mo. 85; *Perkins v. St. Louis, etc., R. Co.*, (1890) 103 Mo. 32; *Briggs v. St. Louis, etc., R. Co.*, (1892) 111 Mo. 168; *Missouri Pac. R. Co. v. Humes*, (1885) 115 U. S. 512; *Missouri Pac. R. Co. v. Terry*, (1885) 115 U. S. 523, note; *St. Louis, etc., R. Co. v. Mathews*, (1897) 165 U. S. 17.

(6) *Liability for Communicated Fires.* — A statute by which every railroad corporation owning and operating a railroad in the state is made responsible in damages for property of any person injured or destroyed by fire communicated by its locomotive engines, and is declared to have an insurable interest in property along its route, and authorized to insure such property for its protection against such damages, does not deny to the railroad company the equal protection of the laws. "The statute is not a penal one, imposing a punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered."

St. Louis, etc., R. Co. v. Mathews, (1897) 165 U. S. 5, affirming *Mathews v. St. Louis, etc., R. Co.*, (1894) 121 Mo. 298; *Campbell v. Missouri Pac. R. Co.*, (1894) 121 Mo. 340.

A Colorado statute which provided that "every railroad corporation operating its line of road, or any part thereof, in this state, shall be liable for all damages by fire that is set out or caused by operating any such line of road or any part thereof," was held to be constitutional. *Union Pac. R. Co. v. De Busk*, (1888) 12 Colo. 294. See also *Union Pac. R. Co. v. Moffatt*, (1888) 12 Colo. 310.

An Oklahoma statute entitled "An Act to regulate prairie fires," providing that "any railroad company operating any line in this territory shall be liable for all damages sustained by fire originating from operating their road," does not deny to a railroad company the equal protection of the law. *Choctaw, etc., R. Co. v. Alexander*, (1897) 7 Okla. 580.

A South Carolina statute providing that "every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employees, except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent; and it shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf," does not deny to a railroad company the equal protection of the law. *McCandless v. Richmond, etc., R. Co.*, (1892) 38 S. Car. 105. See also *Brown v. Carolina Midland R. Co.*, (1903) 67 S. Car. 485; *State v. Hagood*, (1888) 30 S. Car. 519; *Mobile Ins. Co. v. Columbia, etc., R. Co.*, (1893) 41 S. Car. 408; *Lipfeld v. Charlotte, etc., R. Co.*, (1893) 41 S. Car. 285.

(7) *Distinguishing Between Street Railway and Steam Railroad.* — A municipal ordinance provides that "street railroad companies, whether under the control of another company or not, in lieu of the specific tax heretofore required, shall pay to the city of Savannah for the privilege of doing business in the city and for the use of the streets of the city, at the rate of one hundred dollars per mile or fraction of a mile of track used in the city of Savannah by said railroad company." The streets of the city are occupied by a street railroad company, commonly known as such, which is subject to the tax, and by a steam railroad company, not subjected to the tax, which does business in the streets of the city by transporting freights from its regular station to various side tracks, and charges an additional or local price. The ordinance does not deny to the street railway company the equal protection of the law.

Savannah, etc., *R. Co. v. Savannah*, (1905) 198 U. S. 397, wherein the court said: "The argument on the first point is really a somewhat disguised attempt to go behind the decision of the state court that the tax is a tax on business, and to make out that it is a charge for the privilege of using the streets. We see no ground on which we should criticize or refuse to be bound by the local adjudication. The difference between the two railroads is obvious, and warrants the diversity in the mode of taxation. The Central of Georgia Railway may be assumed to do the great and characteristic part of its work outside the city, while the plaintiff does its work within the city. If the former escapes city taxation it does so only because its main

business is not in the city and the state reserves it for itself." *Affirming* (1900) 112 Ga. 164, (1902) 115 Ga. 137.

A municipal ordinance limiting the speed of ordinary railroad trains provided that "the provisions of this ordinance shall not apply to the Inter-state Rapid Transit Railway Company, except with reference to funerals or other processions." On its appearing that the Inter-state Rapid Transit Railway Company was in fact a street-car line operated with electrical engines, it was held that there was no denial of the equal protection of the laws. *Erb v. Morasch*, (1898) 8 Kan. App. 62, *writ of error dismissed* (1899) 60 Kan. 251.

(8) *Distinguishing Between Electric Cars and Ordinary Vehicles.* — That there is a difference between ordinary vehicles and cars propelled by electricity may be recognized by the state in the exercise of its police power, and imposing burdens on an electric street railway, in the matter of maintaining and operating safety gates and signaling appliances, not extended to ordinary vehicles, does not deprive the railway of the equal protection of the laws.

Detroit, etc., R. Co. v. Osborn, (1903) 189 U. S. 383, *affirming* (1901) 127 Mich. 219.

(9) *Distinguishing Between Railroad Company and Individuals in Condemnation of Land for Street.* — It cannot be said that a railroad company has been denied the equal protection of the laws by reason of the final judgment of the court awarding to individual property owners, as compensation for contiguous property appropriated to the public use, the value of their land taken, while only nominal compensation was given to the railroad company, the value of its land, simply as land, across which the street was opened, not being taken into account. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property for the purpose for which it was being used, and for which it was best adapted, subject only to the right of the public to have a street across it.

Chicago, etc., R. Co. v. Chicago, (1897) 166 U. S. 257,

(10) *Excepting One Railroad from Regulation of Speed of Trains.* — A municipal ordinance regulating the speed of railroad trains within the city limits, and excepting one railroad company, is not a denial to the other railroad companies of the equal protection of the laws. "With the presumption always in favor of the validity of legislation, state or municipal, if the ordinance stood by itself the courts would be compelled to presume that the different circumstances surrounding the tracks of the respective railroads were such as to justify a different rule in respect to the speed of their trains."

Erb v. Morasch, (1900) 177 U. S. 585, *affirming* (1899) 60 Kan. 251.

(11) *Prohibiting Heating Cars by Stoves by Certain Railroads.* — A state statute forbidding, under penalty, the heating of passenger cars by stoves or furnaces kept inside the cars or suspended therefrom, and providing that these requirements shall not apply to railroads less than fifty miles in length, does not deny to companies having more than fifty miles of road the equal protection of the laws.

New York, etc., R. Co. v. New York, (1897) 165 U. S. 633.

(12) *Requiring Watchman to Be Stationed at Particular Crossing.* — An Act which requires a particular railroad to maintain a watchman at a particular turnpike crossing is not objectionable on the ground of partial legislation nor as discriminating unlawfully.

Kentucky Cent. R. Co. v. Com., (Ky. 1892) 18 S. W. Rep. 368, the court saying: "Flagmen may be required to be stationed at dangerous places or crossings, when it is deemed necessary to the security of those traveling either upon the highways where

the railroad crosses it or on the train. It is a police regulation that is never surrendered to the state; and for a violation of such laws, enacted for the benefit of the public and to insure safety in travel, the company will be liable."

(13) *Requiring Payment of, or Refusal to Pay, Claim Within a Certain Time.* — A statute providing that all common carriers doing business in the state shall be required to pay for or refuse to pay for all losses, breakage, or damages from breakage, damage, or loss of articles shipped over their lines, within sixty days from the time a claim for the articles so lost, broken, or damaged shall be made, and imposing a penalty for failure so to do, is valid.

Porter v. Charleston, etc., R. Co., (1901) 63 S. Car. 170.

(14) *Prohibiting Business of Ticket Scalping.*

A Pennsylvania statute entitled "An Act to prevent fraud upon travelers" was held to be valid. *Com. v. Keary*, (1901) 198 Pa. St. 500.

A New York statute prohibiting the business of speculating in railroad tickets by con-

fining the sale of such tickets to common carriers and their authorized agents, is repugnant to the Federal Constitution in that it denies the equal protection of the laws as guaranteed by that instrument. *People v. City Prison*, (1898) 157 N. Y. 116, *reversing* (1898) 26 N. Y. App. Div. 228.

(15) *Redemption of Railroad Tickets.* — The constitutional provision is not violated by a statute providing: "It shall be the duty of all railroad companies in this state, or the receiver or trustee of any such railroad company, to provide for the redemption, from the holder thereof, of the whole, or any parts or coupons, of any ticket or tickets which they or any of their duly authorized agents may have sold, if for any reason the holder has not used

and does not desire to use the same, upon the following terms: If neither the ticket nor any part thereof has been used by the holder, he shall be entitled to receive the full amount he paid therefor, and where the ticket has been used in part, the holder thereof shall be entitled to receive the remainder of the price paid for the whole ticket, after deducting therefrom the tariff rate between the points for which the portion of said ticket was actually used: provided, such tickets or parts thereof shall be presented for redemption to the railroad company from which it has been purchased, or the receiver of such railroad company, or to any of the duly authorized ticket agents of such railroad company or receiver thereof, or, in case of a through ticket, to any of the authorized agents of any connecting line, within a time not exceeding ten days after the right to use said ticket has expired by limitation of time as stipulated therein."

Texas, etc., *R. Co. v. Mahaffey*, (Tex. Civ. App. 1904) 81 S. W. Rep. 1049.

(16) *Requiring Railroads to Bear Expense of Alterations to Crossings.* — A state statute authorizing municipal corporations to require alterations in railroad crossings, and allowing the imposition of the entire expense on the railroad companies, does not deny them the equal protection of the laws, when such regulations are applicable to all railroad corporations alike.

New York, etc., *R. Co. v. Bristol*, (1894) 151 U. S. 571.

(17) *Prohibiting Propelling Cars by Steam on Certain Streets.* — A municipal ordinance which prohibits a named railroad company from drawing or propelling its cars by steam on a certain street, does not deny to it the equal protection of the law when the statute so operates that no other person or corporation may run locomotives on that street. On this account, the ordinance, while apparently limited in its operation, is in effect general, as it applies to all who can do what is prohibited. Other railroad companies may occupy other streets and use locomotives there, but other streets may not be situated like that street, neither may there be the same reasons why steam transportation should be excluded from them. All laws should be general in their operation, but all places within the same city do not necessarily require the same local regulation. While locomotives may with very great propriety be excluded from one street, or even from one part of a street, it would be sometimes unreasonable to exclude them from all. It is the special duty of the city authorities to make the necessary discriminations in this particular.

Richmond, etc., *R. Co. v. Richmond*, (1877) 96 U. S. 524.

(18) *Penalty for Allowing Certain Grass or Weeds to Mature.* — A state statute, directed solely against railroad companies, giving the penalty to contiguous owners for permitting Johnson grass or Russian thistle to go to seed upon their right of way, was held not to be a denial of the equal protection of the laws.

Missouri, etc., *R. Co. v. May*, (1904) 194 U. S. 269, wherein the court said: "When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the

courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

(19) *Time of Arrival of Trains to Be Posted.* — Provisions of a statute requiring railroads to place in each passenger depot at any station where there is a telegraph office a blackboard, and to note thereon whether scheduled trains are on time, and if late how much, were held not to conflict with the constitutional provision.

Pennsylvania R. Co. v. State, (1895) 142 Ind. 428.

(20) *Prohibiting Surrender by Employee of Right to Damages.*

An Ohio statute which provides, "and no railroad company, insurance company, or association of other persons shall demand, expect, require, or enter into any contract, agreement, or stipulation with any other person about to enter or in the employment of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company thereafter arising from personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever, and all such

stipulations or agreements shall be void," being directed solely to employees of railroads was held to be class legislation. Laws must be not only uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike. There cannot be one law for railroad employees, another law for employees in factories, and another law for employees on a farm or the highways. *Shaver v. Pennsylvania R. Co.*, (1896) 71 Fed. Rep. 936.

(21) *Screens for Motormen on Certain Cars.* — A statute requiring electric street-car companies to provide screens for the protection of motormen during certain cold months, and not applicable to cable cars, etc., is not unconstitutional as class legislation.

State v. Whitaker, (1901) 160 Mo. 59.

m. TELEGRAPH COMPANIES — (1) *Regulation of Rates.* — A statute prescribing maximum rates for telegraphic service which are less than the cost of performing the service, and therefore unreasonable and confiscatory, is void, as its enforcement would be a denial of the equal protection of the laws.

Western Union Tel. Co. v. Myatt, (1899) 98 Fed. Rep. 359.

(2) *Penalty for Failure to Transmit Message.* — A statute which provided a penalty for a failure to transmit telegraph messages as provided in the Act was held not to violate the Fourteenth Amendment of the United States Constitution because the statute applies to corporation and not to individuals..

Western Union Tel. Co. v. Ferguson, (1901) 157 Ind. 37, the court saying: "In the statute, the business of transmitting messages by telegraph is indicated as being conducted by a 'telegraph company' in one place, by a 'telegraph line' in another, and by any 'person or company' in a third. In considering the connection in which the phrases 'telegraph company' and 'telegraph line' are used, the thought is directed by the context to the manner in which the business shall be conducted rather than to the person who owns

and operates it. An individual, partnership, or corporation may own and operate a 'telegraph line' and do a general business under the name of a 'telegraph company.' After the manner in which the business is to be done is prescribed, every person who violates the provisions is made liable to the aggrieved party. This statute is to be construed strictly; but strict construction does not require the court to gaze fixedly upon a single phrase and to be oblivious to the Act as a whole."

(3) *"Mental Anguish" Statute.* — A statute entitled "An Act to allow damages against telegraph companies doing business in this state for mental anguish or suffering, even in the absence of bodily injury, caused by negligence in receiving, transmitting, or delivering messages," does not deny to telegraph companies the equal protection of the laws. Telegraph companies, as carriers of intelligence, are purely the subject of distinct classification. The statute

is not discriminatory because it does not also include telephone companies or other agencies for the transmission of news.

Simmons v. Western Union Tel. Co., (1901) 63 S. Car. 429.

n. REGULATING WATER RATES. — It is not a denial of the equal protection of the laws to fix water rates so as to give an income of six per cent. upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent. a month income upon the capital actually invested in the undertaking. If not hampered by an unalterable contract, providing that a certain compensation should always be received, a law which reduces the compensation theretofore allowed to six per cent. upon the present value of the property used for the public is not unconstitutional.

Stanislaus County v. San Joaquin, etc., Canal, etc., Co., (1904) 192 U. S. 213.

o. REGULATING GAS RATES. — An ordinance of a town which authorized a gas company to charge a certain flat rate a year or month at its option, or a sum specified per one thousand cubic feet to any consumer, did not authorize a charge of a meter rate to one person only, whic his substantially higher than the flat rate, as this would violate the constitutional provision.

Indiana Natural, etc., Gas. Co. v. State, (1902) 158 Ind. 516.

p. REGULATING TURNPIKE RATES. — A statute which prescribes the rates which may be charged by a turnpike company does not deny to that company the equal protection of the law, when the rates prescribed are much less than those imposed by the general statutes upon other turnpike companies of the state. The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use.

Covington, etc., Turnpike Road Co. v. Sandford, (1896) 164 U. S. 597.

q. REGULATING STOCKYARD RATES. — A statute regulating the charges which might be made by stock yards in terms applies only to those stock yards within the state "which for the preceding twelve months shall have had an average daily receipt of not less than one hundred head of cattle, or three hundred head of hogs, or three hundred head of sheep." By the statute a classification is attempted between stock yards doing a large and those doing a small business, as the express and only basis of classification is in the amount of business done by the two classes, and without any reference to the character or value of the services rendered. Such a statute is not simply legislation which in its direct results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do, and is a denial of the equal protection of the laws.

Cotting v. Kansas City Stock Yards Co., (1901) 183 U. S. 102, *reversing* (1897) 79 Fed. Rep. 679, (1897) 82 Fed. Rep. 839, (1897) 82 Fed. Rep. 850.

r. **REGULATING IRRIGATION RATES.** — An order of a board of supervisors of a county fixing the rates which an irrigation company should charge for water distributed by it, which would deprive it from earning a reasonable profit on its investment, amounts substantially to denying it the equal protection of the law.

San Joaquin, etc., Canal, etc., Co. v. Stanislaus County, (1898) 90 Fed. Rep. 516.

s. **REGULATING BUSINESS AND RATES OF GRAIN ELEVATORS.** — A general state statute regulating the business and charges of public warehousemen engaged in elevating and storing grain for profit, does not deny to any one the equal protection of the laws.

Brass v. North Dakota, (1894) 153 U. S. 405, affirming State v. Brass, (1892) 2 N. Dak. 482.

Regulating rates in cities having over stated population. — A state statute fixing the rates which may be charged at grain elevators, which provides that it shall apply only to places which have a population of 130,000 or more, does not deny to elevator owners in cities having that population the equal protection of the law. Budd v. New York, (1892) 143 U. S. 548, affirming People v. Budd, (1889) 117 N. Y. 1.

A state statute which fixes the maximum of charges for the stowage of grain in warehouses at places in the state having not less than 100,000 inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved," does not deprive the owners of warehouses in cities having a stated population of the equal protection of the law. Munn v. Illinois, (1876) 94 U. S. 135, affirming (1873) 69 Ill. 80.

t. **INSURANCE COMPANIES** — (1) *In General.* — The classification of insurance companies and their contracts is no more a special classification than is the classification of railroads. On the contrary, by reason of the nature of the business insurance companies conduct; by reason of the character of their contracts, which may last for the life of the assured or may terminate in a year or in a quarter; by reason of the common experience of mankind with reference to the manner in which the contracts of such companies are secured, and the companies' manner of dealing with the assured while he lives and with the beneficiaries after his death, such companies and such contracts naturally and properly belong to a class by themselves and must be governed by laws that would be wholly inappropriate to any other company or any other contracts.

Andrus v. Fidelity Mut. L. Ins. Assoc., (1902) 168 Mo. 151, holding that the constitutional provision is not violated by a practice of admitting proof of a waiver of the terms of an insurance policy without a special plea, since the practice is applied to all persons and companies alike.

Requiring notice of premium due. — A New York statute, making it a condition of the right of an insurance company to avoid a policy and forfeit the premiums that have been paid that the company shall issue a prescribed kind of notice, is not invalid as operating unequally upon life insurance companies doing business in New York. The binding force of the statutes applies to all companies equally. It applies to all New York

companies as to all business which they do in that state, and it applies to Connecticut companies as to all business that they do in New York. If a Connecticut company, having an office in New York, writing and issuing policies there, collecting premiums there, and doing all the business of life insurance companies in the state of New York, should receive an application at its office in New York from Washington, act upon it there, and issue a policy there, which by its terms would be performed in the state of New York, the contract would be governed by the law of New York, just the same as though its incorporation were under the law of New York, instead of being under the law of Connecticut. Phinney v. Mutual L. Ins. Co., (1895) 67 Fed. Rep. 496.

(2) *Answers of Applicants Not to Bar Right to Recover.* — A state statute providing that "no answer to any interrogatory made by an applicant, in his

or her application for a policy, shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is wilfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer," does not show such an arbitrary classification or unlawful discrimination as would justify the court in saying that the Constitution had been violated in the exercise in this regard, by a state, of its undoubted power over corporations.

Hancock Mut. L. Ins. Co. v. Warren, (1901) 181 U. S. 73.

(3) *Discriminating Against Fire Companies.* — A state statute relating to contracts of fire insurance does not deny the equal protection of the laws as discriminating between fire insurance companies or corporations and those engaged in other kinds of insurance.

Orient Ins. Co. v. Daggs, (1899) 172 U. S. 563, affirming Daggs v. Orient Ins. Co., (1896) 136 Mo. 382.

Voiding stipulations limiting liability. — A Tennessee statute providing "that insurance companies shall pay their policyholders the full amount of loss sustained upon property insured by them; Provided, said amount of loss does not exceed the amount of an in-

surance expressed in the policy; and all stipulations in such policies to the contrary are, and shall be, null and void; Provided, however, That insurance policies upon cotton in bales shall not be subject to the provisions of this Act," was held not to deny the equal protection of the laws. Dugger v. Mechanic's, etc., Ins. Co., (1895) 95 Tenn. 248. See also Phoenix Ins. Co. v. Levy, (1895) 12 Tex. Civ. App. 45.

(4) *Favoring Certain Fraternal Orders.* — The constitutional provision was held not to have been violated by a statute pertaining to fraternal associations which exempted from its provisions certain named orders issuing insurance or benefit certificates.

Supreme Lodge United Benev. Assoc. v. Johnson, (Tex. 1904) 81 S. W. Rep. 18, reversing (Tex. Civ. App. 1903) 77 S. W. Rep. 661.

u. **BANKING AND TRUST COMPANIES** — (1) *Limiting Right to Carry on Business of Banking.* — A state statute which prohibits individuals and firms who are citizens of the United States from carrying on the business of banking, and confers the exclusive privilege of carrying on such business upon corporations organized as provided by an Act of the legislature, on the theory that such business is or may be made a franchise by legislative authority, violates this clause.

State v. Scougal, (1892) 3 S. Dak. 55.

(2) *Prohibiting Insolvent Banker Taking Deposit.* — A statute which forbids a banker, being insolvent, from taking a deposit on the pretense of solvency, and punishing a violation as for an embezzlement, does not deny to him the equal protection of the laws.

Dreyer v. Pease, (1898) 88 Fed. Rep. 980. See also Baker v. State, (1882) 54 Wis. 368.

(3) *Discriminating Between Officers of Banks and Trust Companies.* — The section of the Missouri constitution providing that "it shall be a crime, the nature and punishment of which shall be prescribed by law, for any president,

director, manager, cashier, or other officer of any banking institution, to assent to the reception of deposits, or the creation of debts by such banking institution, after he shall have had knowledge of the fact that it is insolvent, or in failing circumstances; and any such officer, agent, or manager shall be individually responsible for such deposits so received, and all such debts so created with his assent," and a statute passed in pursuance thereof, are not invalid from the fact that officers of trust companies are not included within its provisions.

State v. Darrah, (1899) 152 Mo. 525, in which case the court said: "The language of the provision is comprehensive of a whole class. It exempts no one of that class. It applies to every president, director, manager, cashier, or other officer of every banking institution in the state. By it all per-

sons of that class are treated alike under similar circumstances and conditions. The classification is a natural and reasonable one, and the class, from the peculiar relation it sustains to the public, whose property the law is designed to protect, is a proper subject of such legislation."

v. BUILDING AND LOAN ASSOCIATIONS — (1) *Requiring Compliance with Certain Conditions.* — A statute requiring that all persons or companies now engaged or that may hereafter engage in issuing contracts and providing for the redemption or fulfilling thereof by the accumulation of a fund from contributions by the holders of such contracts, or providing for the maturing or fulfilling of such contracts in the order of their issue, or in some other fixed or arbitrarily determined manner, or providing for paying money or giving property represented to be of greater value than the amount paid under such contract, with the net earnings added, or providing for the loaning of funds contributed by the holders of such contracts in any fixed or arbitrarily determined order or manner, or for making loans to such subscribers from such funds, to be repaid in installments, shall, for the protection of the subscribers or holders of such contracts, be required to comply with certain conditions, does not violate this clause, as it relates to all persons or companies who engage in the character of business sought to be regulated.

State v. Preferred Tontine Mercantile Co., (1904) 184 Mo. 160.

(2) *Authorizing Usurious Charges.* — A state statute authorizing building and loan associations to make usurious charges upon citizens of the state who voluntarily enter into the contracts contemplated, is not such a violation of this clause as will justify a judgment of the national courts annulling such legislation.

Brandon v. Miller, (1902) 118 Fed. Rep. 362.

w. REGULATING SLAUGHTER-HOUSE BUSINESS. — A state statute incorporating a slaughter-house company prohibited the landing and slaughter of animals intended for food within a certain city in the state except by the corporation thereby created; it authorized the company to establish and erect, within certain territorial limits therein defined, one or more stock yards, stock-landings, and slaughter-houses, and imposed upon it the duty of erecting a slaughter-house of a certain capacity; and it declared that the company should have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the Act, and that all such animals shall be landed at the stock-landings and

slaughtered at the slaughter-houses of the company, and nowhere else. It was held that the butchers of the city were not denied the equal protection of the law within the meaning of this amendment.

Slaughter-House Cases, (1872) 16 Wall. (U. S.) 81. See *Live Stock, etc., Assoc. v. Crescent City Live Stock Landing, etc., Co.*, (1870) 1 Abb. (U. S.) 388, 15 Fed. Cas. No. 8,408.

Revoking right to carry on business in certain limits.—A municipal ordinance provided that "it shall be lawful for any person or corporation to keep and maintain slaughter-houses, etc., within certain limits, under certain regulations." While this ordinance was in force the complainant, a citizen of France, whose trade and business was the slaughtering of cattle for food, desiring and intending to engage in such business in New Orleans, leased, with the privilege of

buying, two squares of ground situated within the limits defined by said ordinance, and proceeded to improve such buildings, and construct on said ground other buildings and improvements suitable for the trade in which he was engaged, investing in said improvements a considerable sum of money. The above ordinance was subsequently amended making it unlawful to keep and maintain slaughter-houses within said limits prescribed in the original ordinance, and under said regulations, "except permission be granted by the council of the city of New Orleans." It was held that the amended ordinance denied to the complainant the equal protection of the laws. *Barthet v. New Orleans*, (1885) 24 Fed. Rep. 564.

x. COMPELLING MUNICIPALITY TO BUY LIGHTING PLANT.—The constitutional provision is not violated by a statute providing that "when any city, town, or borough shall decide, as herein provided, to establish a plant, and any corporation incorporated by the general assembly for the purpose of furnishing gas or electric light, heat, or power, shall at the time of the first vote required for such decision, be engaged in the business of making, generating, or distributing gas or electricity, for sale for lighting purposes to consumers in such city, town, or borough, such city, town, or borough shall, if such corporation shall elect to sell and comply with this Act, before establishing its plant, purchase of such corporation such portion of its plant for gas, and property suitable and used for such business or in connection therewith, if the city, town, or borough shall have decided to establish a gas plant, or of its plant for electric lighting, and property suitable and used for such business or in connection therewith if such city, town, or borough shall have decided to establish * * * an electric-lighting plant, as shall have at the time of the first vote been engaged in or acquired for such business. If in any such city, town, or borough, a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants. * * * Any corporation desiring to enforce the obligation of any city, town, or borough, under this Act, to purchase any property shall file with the clerk of said city, town, or borough, within thirty days after the passage of the final vote, whereby said city, town, or borough shall have decided to establish a plant, a detailed schedule describing such property, and stating the terms of sale proposed. If the parties fail to agree as to what shall be sold, or what the terms of sale or delivery shall be, either party may, after thirty days after filing the schedule, apply by petition to the Superior Court for the county in which such plant is located, or to any judge thereof in vacation, setting forth the facts, and praying an adjudication between the parties, and thereafter such court or judge shall, after notice and hearing, appoint a special commission of one or three persons who shall give the parties an opportunity to be heard,

and shall thereafter adjudicate whether the property contained in said schedule, real or personal, including rights and easements, properly belong to such plant, and should be sold by the one and purchased by the other, and what the time, price, and other conditions of sale and delivery thereof shall be. Such commission shall report its doings to the Superior Court for the county in which the plant is located for confirmation by said court."

Norwich Gas, etc., Co. v. Norwich, (1904) 76 Conn. 565.

y. REGULATION OF COAL MINES ACCORDING TO NUMBER OF MEN EMPLOYED.

— A statute imposing penalties upon persons engaged in the mining business, and limiting its application to coal mines "where more than five men are employed at any one time," is a species of classification which the legislature is at liberty to adopt.

St. Louis Consol. Coal Co. v. Illinois, (1902) 185 U. S. 207.

z. EXPENSES OF COMMISSION TO BE PAID BY CORPORATIONS TO BE REGULATED. — A state statute making an assessment tax upon the railroad companies in the state to meet the expenses and salaries of state railroad commissioners, does not deny to the railroad companies the equal protection of the law. "Requiring that the burden of service deemed essential to the public, in consequence of the existence of the corporations and the exercise of privileges obtained at their request, should be borne by the corporations in relation to whom the service is rendered, and to whom it is useful, is neither denying to the corporations the equal protection of the laws or making any unjust discrimination against them. All railroad corporations in the state are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all."

Charlotte, etc., R. Co. v. Gibbs, (1892) 142 U. S. 390.

to be borne by the several corporations owning or operating electrical lines within the city, does not deny to the owners of such lines the equal protection of the law. New York v. Squire, (1892) 145 U. S. 191.

A statute requiring the salaries and expenses of a board of subway commissioners

a1. MAKING DIRECTORS SURETIES FOR OFFICERS. — Section 3 of Article XII. of the Constitution of California, which provides that the directors or trustees of corporations and joint stock associations shall be jointly and separately liable to the creditors and stockholders for all moneys embezzled and misappropriated by the officers of such corporation or joint stock association during the term of such directors or trustees, was held not to be in conflict with the Fourteenth Amendment of the Federal Constitution.

Winchester v. Howard, (1902) 136 Cal. 432.

b1. GRANT OF PRIVILEGES TO FOREIGN CORPORATIONS. — A state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporation of interstate or foreign commerce.

Pembina Consol. Silver Min., etc., Co. v. Pennsylvania, (1888) 125 U. S. 189, wherein the court said: "The equal protection of

the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state.

The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more," and held that a statute which provides that no foreign corporation which does not invest or use its capital in the state, shall have an office or offices in that state, for the use of its officers, stockholders, agents, or employees, unless it shall first have obtained an annual license so to do, does not deny to any person the equal protection of the law. See also *Keystone Driller Co. v. Superior Ct.*, (1903) 138 Cal. 738; *Goodrel v. Kreichbaum*, (1886) 70 Iowa 362; *Com. v. Mobile, etc., R. Co.*, (Ky. 1901) 64 S. W. Rep. 451; *Debnam v. Southern Bell Telephone, etc., Co.*, (1900) 136 N. Car. 831; *Dugger v. Mechanics, etc., Ins. Co.*, (1895) 95 Tenn. 250.

That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. *Orient Ins. Co. v. Daggs*, (1899) 172 U. S. 566.

Without attempting to state what is the full import of the words "within its jurisdiction," it is safe to say that a corporation not created by a state, nor doing business there under conditions that subjected it to process issuing from the courts of a state at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that state. *Blake v. McClung*, (1898) 172 U. S. 261.

A foreign corporation is not within the jurisdiction of a state until it is admitted by the state upon a compliance with the conditions of admission, which the state has a right to impose. This is so as to a foreign insurance corporation which has been doing business in a state under annual licenses. "The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee.

If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction." *Philadelphia F. Assoc. v. New York*, (1886) 110 U. S. 115.

When a foreign corporation has a right to sue in the courts of a state, and holds a mortgage within the state, it should have the equal protection of the laws so far as a suit to foreclose the mortgage is concerned, and if a state statute should be interpreted as forbidding such a corporation from purchasing the property named in the mortgage at the judicial sale, ordered in a foreclosure suit, it would be a denial to such company of the equal protection of the laws, and this would be so though the corporation had not complied with the requirements of the state law imposing conditions on its right to do business within the state. *Black v. Caldwell*, (1897) 83 Fed. Rep. 880.

Discriminating against agents of foreign corporations. — A Vermont statute entitled "Loan and Investment Companies," which, under the division "Foreign Corporations," provides that no person shall act in this state as agent or representative of such corporation, company, or firm, or sell, offer for sale, or negotiate choses in action owned, issued, negotiated, or guaranteed by it, unless such corporation, company, or firm has filed with the inspector of finance a bond to the state for such an amount as he requires, not more than ten thousand dollars and not less than five hundred dollars, with such sureties or security as he may approve, conditioned for the making of such returns as may be required and the payment of all taxes that may be assessed against it, and in all things to comply with the laws of this state; and has submitted itself and its financial condition to an examination by the inspector in such manner as to enable him to make a report thereof, as specified in this chapter, "in case of like corporations in this state," discriminates between agents of firms organized under the laws of the state, and agents of firms organized under the laws of other states, making the act of the latter unlawful while the act of the former in the same circumstances would be lawful, and therefore contravenes this clause. *State v. Cadigan*, (1901) 73 Vt. 247.

cl. CONDEMNATION PROCEEDINGS. — The fact that under a statute corporations and persons other than a particular water company, the property of which is taxed under the Act, are entitled to have damages or compensation assessed by a jury does not make the Act contrary to the Fourteenth Amendment of the United States Constitution as denying the water company the equal protection of the laws, since the rights of the company to compensation are recognized, and no greater right is conferred upon others, the only difference being in the procedure.

Kennebec Water Dist. v. Waterville, (1902) 96 Me. 234, the court saying: "The legislature has entire discretion, to designate any

impartial tribunal to assess compensation, whether jury, commissioners, or appraisers. We perceive no reason for precluding the

legislature from prescribing in the same Act for the assessment of compensation by different tribunals for different classes of property taken, nor are we aware of any decision of any court holding that the legislature is so precluded. Ordinarily the compensation for tangible property taken may properly be determined by a jury; but when the property and franchises of a large corporation are taken for public uses, and the value, not only of tangible property, but of the franchise, rights, privileges, and contracts, are factors in determining the amount of compensation to be paid, the legislature may well determine that commissioners or appraisers, the members of which have peculiar skill and experience in such matters, can, better than a jury, do exact justice to the corporation whose property has been condemned and taken."

The constitution of California of 1879 provided that "private property shall not be taken or damaged for public use without just compensation having been first made and paid into court for the owner." These constitutional provisions were held not to be in conflict with the Fourteenth Amendment of the Federal Constitution, but were merely limitations on the power of the legislature of the state; however, construing the state consti-

tutional provision with the Fourteenth Amendment of the Federal Constitution, the conditions of the state constitution must be applied by the legislature, not merely to corporations, but to all other parties which exercise the power of eminent domain. *Steinhart v. Superior Ct.*, (1902) 137 Cal. 575.

Under a constitutional provision of *California*, which provides for just compensation in all cases of land taken for public use, the legislature has not the power to provide that the owner of property shall receive a sum for the taking of land by a natural person smaller than that when land is taken by a corporation. No deduction for general benefits not taken in any case can be had, and a provision of the code which allows such benefits to be deducted in the case of a natural person, which cannot be allowed in favor of a private corporation under the Constitution, is unconstitutional. *Beveridge v. Lewis*, (1902) 137 Cal. 619.

A South Carolina statute providing for condemnation by telephone companies of the right of way of the railroad company over lands held by it in fee or condemnation, was held not to violate the constitutional provision. *South Carolina, etc., R. Co. v. American Telephone, etc., Co.*, (1902) 65 S. Car. 459.

dl. MANUFACTURE AND SALE OF GOODS — (1) *Intoxicating Liquors* —

(a) *In General.* — A state has power to prohibit the sale of intoxicating liquors altogether, if it sees fit, and has the power to prohibit it conditionally.

Rippey v. Texas, (1904) 193 U. S. 509.

Permitting sale on prescription. — A local option law which provides that its provisions should not be so construed to prohibit the sale of alcoholic stimulants as medicine, but such stimulants should only be sold upon the written prescription of a regular practicing physician under certain conditions, was held, as to a proviso that a physician who does not follow the profession of medicine as his principal and usual calling shall not be authorized to give the prescriptions provided for, to deny the equal protection of the law to one who was a graduate of a school of medicine and a practicing physician, and whose principal and usual business at the time was acting as postmaster, but he had many patients whose regular physician he was and for whom he prescribed. *Busch v. Webb*, (1903) 122 Fed. Rep. 660.

A municipal ordinance providing, "Be it further ordained by the authority aforesaid that it shall be unlawful to sell liquors at wholesale or retail in connection with drugs or in drug stores; provided that the compounding of liquors with drugs as parts of prescriptions, *bona fide*, made by reputable physicians in the treatment of disease, shall not constitute a violation of this ordinance," does not deny to a wholesale and retail dealer in drugs the equal protection of the laws. *Jacobs Pharmacy Co. v. Atlanta*, (1898) 89 Fed. Rep. 245.

A state may absolutely prohibit the manufacture or sale of intoxicating liquors. *Kansas v. Bradley*, (1885) 26 Fed. Rep. 290.

The *Texas* local-option law prescribing a penalty against any person who shall sell intoxicating liquors in any county, justice precinct, city, or town in which the sale of intoxicating liquors had been prohibited, was held to be valid. *Rippey v. State*, (Tex. Crim. 1903) 73 S. W. Rep. 15.

"**Four-mile Law.**" — A state statute which prohibits within four miles of an institution of learning the sale of intoxicating liquors, does not violate the Constitution on the ground of class legislation where sales by manufacturers in wholesale packages are quantities exempt from its provisions. *Webster v. State*, (Tenn. 1903) 75 S. W. Rep. 1020.

Prohibiting sale to students. — The constitutional provision is not violated by a statute prohibiting the sale of liquor to students of institutions of learning. *Peacock v. Limburger*, (Tex. Civ. App. 1902) 67 S. W. Rep. 518.

Sale of liquors to minors. — A *Michigan* statute making it an offense to allow a minor to remain in a saloon where intoxicating liquors are sold does not violate this amendment. *People v. Japinga*, (1897) 115 Mich. 222. See also *McLaury v. Watelsky*, (Tex. Civ. App. 1905) 87 S. W. Rep. 1045, as to a

statute giving a right of action upon a liquor dealer's bond for selling to minors.

Compelling disclosure in reference to obtaining intoxicating liquors.—A statute of *Connecticut* which provided that on the trial of any person prosecuted for intoxication, if he shall be found guilty it shall be the duty of the prosecuting officer to request him to disclose, under oath, when, where, and from whom he procured the liquor, and that if he shall refuse to make such disclosure it shall be the duty of the magistrate before whom the trial is had to commit the accused for contempt, was held to be constitutional. *In re Clayton*, (1890) 59 Conn. 510.

Regulating the sale of liquors does not deny equal protection. *Trageser v. Gray*, (1890) 73 Md. 250. See also *State v. Bixman*, (1901) 162 Mo. 39; *Webster v. State*, (Tenn. 1903) 75 S. W. Rep. 1020.

An ordinance of the city of New Orleans which provided that no one shall open or establish a drinking house or establishment for the retail of spirituous liquors without first obtaining a license or permit from the city council, was held not to be unconstitutional. *State v. Mattie*, (1896) 48 La. Ann. 728.

May impose conditions on sale.—As a state may prohibit the sale of liquor altogether, since it is clearly not a privilege or immunity in the meaning of the Constitution, it may authorize the sale on such terms and by such persons and at such places as it may deem proper. *In re Hoover*, (1887) 30 Fed. Rep. 55.

Discretion in matter of issuing licenses.—A *Maryland* statute which prescribed a system pertaining to the sale of intoxicating liquors in the city of Baltimore, and established a board of commissioners authorizing them to grant licenses for retail sale only, to United States citizens of temperate habits and good moral character, is not contrary to the constitutional provision, and it is a proper exercise of the police power of the state. *Trageser v. Gray*, (1890) 73 Md. 250.

A municipal ordinance which makes the issue of a license to retail liquor depend upon the permission of the majority of the board of police commissioners, or, if that cannot be obtained, upon the approval of twelve property owners in the block in which the business is carried on, is valid. "The objection is, that this makes the license depend upon the arbitrary will and pleasure of the board of police commissioners in the first instance, and of the twelve property owners in the second, and the case of *Yick Wo v. Hopkins*, (1886) 118 U. S. 356, and other cases from the federal courts are cited. But whatever force this objection might have in reference to licenses to carry on the ordinary avocations of life, which are not supposed to have any injurious tendency, it has no force in the present case. It is well settled that the governing power may prohibit the manufacture and traffic in liquor altogether, provided only that it does not interfere with interstate commerce. * * * And if the gov-

erning power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases." *Ex p. Christensen*, (1890) 85 Cal. 212.

Distinguishing incorporated towns and country districts.—A statute which requires conditions to the issue of liquor licenses in country districts which are not required in the case of licenses issued in incorporated towns and cities, does not deny to any one the equal protection of the law. *U. S. v. Ronan*, (1887) 33 Fed. Rep. 119. See also *State v. Berlin*, (1884) 21 S. Car. 292.

Distinguishing manufacture for domestic use and for export.—A *Missouri* statute requiring those who manufacture liquors for sale in the state to pay a tax of ten cents per gallon, and demanding no tax from those who manufacture in the state liquors to be sold in other states, violates this clause. *State v. Bengsch*, (1902) 170 Mo. 117.

A *Missouri* statute concerning the inspection of beer, which exacted a fee from manufacturers of beer for sale in the state, which fee manufacturers for purposes of exportation were not required to pay, was held to be unconstitutional by a divided court. *State v. Eby*, (1902) 170 Mo. 497.

Permitting sales of cider by manufacturers.—The constitutional provision was held to be violated by a *Vermont* statute providing that "no person shall furnish or sell or expose or keep for sale any intoxicating liquor except as authorized in this Act; but the provisions of this Act shall not apply to sales by the barrel by the manufacturers thereof, of cider manufactured in this state, or to sales by the barrel by farmers who raise apples sufficient to make the cider which they sell, if it is not drunk on the premises. Nor shall the provisions of this Act apply to sales by the makers thereof of native wines manufactured in this state and not to be drunk on the premises of the maker." *State v. Scampini*, (1904) 77 Vt. 92.

Distinguishing foreign and domestic manufacturers as to evidence of purity.—A state statute, respecting the shipment of beer into the state for sale, requires the shipper to furnish the inspector "with a sworn affidavit, subscribed by an officer authorized to administer oaths from the manufacturer thereof, or other reputable person having actual knowledge of the composition of said beer or other malt liquors, that no material other than pure hops or the extract of hops, or pure barley, malt, or wholesome yeast or rice, was used in the manufacture of the same." Such a requirement was held not to deny to such shippers the equal protection of the laws when the state statutes provide for an actual inspection by test at the breweries of the domestic manufacturers. *Pabst Brewing Co. v. Crenshaw*, (1903) 120 Fed. Rep. 149.

Ordinance directed against women.—A municipal ordinance providing that "it shall be unlawful for any female person, in the night-time, after twelve o'clock, midnight, to be in any public drinking saloon, beer cellar,

or billiard room within said city, where vinous, malt, or spirituous liquors are sold or given away, to be drank on the premises," is not void because its operation is confined to one class of persons. *Es p. Smith*, (1869) 38 Cal. 703.

Employment of women in bar-rooms.—A municipal ordinance forbidding any female not having a license permitted by law, to sell, offer, procure, furnish, or distribute liquors or drinks, where intoxicating liquors are sold, does not deny to women the equal protection of the laws, notwithstanding the provision that nothing therein "shall be so construed as to prevent the wife of any person having such a license from selling or distributing the aforesaid liquors." *Hoboken v. Goodman*, (1902) 68 N. J. L. 218. See also *Bergman v. Cleveland*, (1884) 39 Ohio St. 651.

Within one mile of Soldiers' Home.—A *Michigan* Act which provides that it shall not be lawful to establish or maintain a saloon or other place of entertainment in which intoxicating liquors are sold, or kept for sale, within one mile of the Soldiers' Home, and also prohibits the sale or giving of liquor to a soldier, sailor, or marine, who is an inmate or employee of such Home, within the same distance, was held to be

constitutional. *Whitney v. Grand Rapids Tp.*, (1888) 71 Mich. 234.

Possession prima facie evidence of unlawful sale.—A *North Carolina* statute which provides that it shall be unlawful for any person, etc., other than licensed retail dealers, to sell, exchange, barter, or dispose of, for gain, or to keep for sale, within the county of Union, any spirituous, vinous, malt, and intoxicating liquors, etc.; that if any person other than licensed retail dealers, under state laws, shall keep in his possession liquor to the quantity of more than one quart within the county, it shall be *prima facie* evidence of his keeping it for sale, within the meaning of the Act, was held to be constitutional. *State v. Barrett*, (1905) 138 N. Car. 630.

Prohibiting bringing actions for liquor illegally sold.—A state statute prohibiting bringing actions in the state courts to recover for intoxicating liquors purchased in another state with intent to sell them in the state in violation of law, was held not to violate the constitutional provision. *Corbin v. Houlehan*, (Me. 1905) 61 Atl. Rep. 131, the court saying: "This clause merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

(b) **In the Matter of Ordering Local Option Elections.**—A state local option law which, in the matter of ordering subsequent elections after prohibition has been defeated or carried, discriminates in favor of those who vote for prohibition, does not deny to any one the equal protection of the laws.

Ripley v. Texas, (1904) 193 U. S. 509.

(c) **Excepting Certain Classes from Prohibition.**—A state local option law permitting municipal corporations to prohibit the selling, furnishing, and giving away of intoxicating liquors, excepting druggists, manufacturers, persons who give away liquors in their private dwellings, and railway corporations dispensing liquors in dining and buffet cars under state license, is not objectionable as denying to a retail dealer in liquor the equal protection of the law.

Ohio v. Dollison, (1904) 194 U. S. 448.

(2) **Oleomargarine.**—A state statute which prohibits the manufacture out of oleaginous substances, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or prohibits the manufacture of any imitation or adulterated butter or cheese, or the selling or offering it for sale or having it in possession with intent to sell as an article of food, is a lawful exercise by the state of the power to protect by police regulations the public health. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions, thus recog-

nizing and preserving the principle of equality among those engaged in the same business.

Powell v. Pennsylvania, (1888) 127 U. S. 683, wherein the court said: "And as it does not appear upon the face of the statute or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions," *affirming* (1886) 114 Pa. St. 265. See also *McCann v. Com.*, (1901) 198 Pa. St. 509, *affirming* (1900)

14 Pa. Super. Ct. 231; *Walker v. Com.*, (Pa. 1887) 11 Atl. Rep. 623.

An Ohio statute allowing the manufacture and sale of oleomargarine when free from any coloring matter or other ingredient causing it to look like or to appear to be butter as defined in the statute, and which, moreover, expressly forbids the manufacture or sale within the state of any oleomargarine which contains any methyl, orange, butter yellow, annatto, aniline dye, or any other coloring matter, does not deny the equal protection of the laws though the state statutes permit harmless coloring matter to be used in butter. *Capital City Dairy Co. v. Ohio*, (1902) 183 U. S. 245.

(3) *Cigarettes*. — An ordinance, uniform in its application, which regulates and imposes a license on the sale of cigarettes under a penalty for its violation, is a constitutional exercise of authority.

Gundling v. Chicago, (1898) 176 Ill. 340, *affirmed* (1900) 177 U. S. 183.

(4) *Regulating Markets*. — A municipal ordinance prohibiting the keeping of a private market within six squares of any public market of the city, does not deny to any one the equal protection of the law.

Natal v. Louisiana, (1891) 139 U. S. 622.

Discretion in board to issue license. — A municipal ordinance providing that "it shall be unlawful for any person or persons, firm, or corporation, to keep open or establish, maintain or conduct within the limits of the city of Denver, any butcher shop or meat market without first having obtained a license therefor, as herein provided: Any person or persons desirous of procuring a license shall make application to the fire and police board for the same, and such application shall have indorsed thereon the approval of the health commissioner before it shall be considered by the said fire and police board; and there shall have been deposited with the city treasurer the sum of fifty dollars, which

is hereby fixed as the annual fee of such license, to be evidenced by the receipt of the city treasurer, indorsed on said application. If the fire and police board refuses to order the issuance of such license to the party or parties applying for the same, the money so deposited with the city treasurer shall be returned to the applicant without any further action," is invalid as it confers upon the fire and police board and upon the health commissioner, not a discretion to be exercised upon the consideration of the circumstances of each case as applied to general regulations and requirements in reference to all engaged in the same business, but a naked, arbitrary power to grant or withhold licenses without assigning any reason whatever therefor. *Walsh v. Denver*, (1898) 11 Colo. App. 523.

(5) *Stipulation in Note, "Given for a Patent Right."* — The constitutional amendment is not violated by an Act which requires that every promissory note or other negotiable instrument wherein the consideration consists in whole or in part of the right to make, use, or vend any patent invention, shall have prominently and legibly written on the face thereof, "given for a patent right," and which makes it a misdemeanor to deal knowingly with a promissory note or negotiable instrument without these words.

Shires v. Com., (1888) 120 Pa. St. 368.

A Tennessee statute providing "that hereafter it shall be unlawful for any person, either in his own behalf or in a representative capacity, to take or receive for the sale of a patent right, or any interest therein, a note or other written security, given for such right or any interest therein, unless it shall clearly

appear upon the face of the note or other security that the same is given in the purchase of a patent right or an interest therein," does not violate this clause. The fact that patent rights constitute a large and peculiar class of property, and that sales of them afford unusual and peculiar opportunities for the employment of imposition and fraud, is a good reason for the passage of a

law applicable to them alone. *State v. Cook*, (1901) 107 Tenn. 501.

Exempting merchants and dealers.—An *Arkansas* statute exempting merchants and dealers who sell patented things in the usual course of business from the operation of the statute, which declares void any negotiable

instrument given in payment for the purchase of any patented machine bought on a credit when the instrument is not executed on a printed form showing upon its face that it was executed in consideration of a patented machine, is void. *Union County Nat. Bank v. Ozan Lumber Co.*, (1904) 127 Fed. Rep. 206.

(6) *Use of Union Labels.*—A municipal ordinance providing: "Be it enacted that all city printing shall bear the union label of the Nashville Allied Trades Council or the label enacted by the International Typographical Union" does not undertake to fix a standard of quality, but it singles out a certain class, and requires the board of public works to purchase from that class, and from no other. This is an arbitrary discrimination and the city has no authority or power to pass such an ordinance.

Marshall, etc., Co. v. Nashville, (1902) 109 Tenn. 497.

Prohibiting use of union labels on non-union goods.—A statute of *Pennsylvania* providing for the adoption of trademarks, labels, symbols, or private stamps, by any incorporation or incorporated association or union of workmen, and prohibiting the

use, upon goods not manufactured by union workmen, of labels declaring them to be so manufactured, does not deny the equal protection of the laws contrary to the Fourteenth Amendment. *Com. v. Norton*, (1899) 9 Pa. Dist. 132, *affirmed* (1901) 16 Pa. Super. Ct. 423; *Com. v. Morton*, (1899) 23 Pa. Co. Ct. 386.

(7) *Regulating Sales of Merchandise Out of Ordinary Course of Business.*

The constitutional provision would be violated if the statutory provisions of *Indiana* which prohibit bulk sales of merchandise give to wholesale merchants a claim upon stocks of goods so sold, superior to other claims. *Sellers v. Hayes*, (1904) 163 Ind. 422.

An *Indiana* statute which prohibited bulk sales of merchandise, with certain exceptions, and enacted that a sale shall be void where the conditions prescribed are not complied with as to the vendor's merchandise creditors and certain other creditors, was held to be

unconstitutional. *McKinster v. Sager*, (1904) 163 Ind. 671.

The *New York* statute which provides for regulating sales of merchandise either in bulk or out of the ordinary course of business, so that the creditors of the vendor may not be defrauded, and requires that they be notified of the contemplated sale, in order that they may have an opportunity to protect themselves against such transfer of the debtor's property as would deprive them of the means of collecting their debts, was held to be constitutional. *Wright v. Hart*, (1905) 103 N. Y. App. Div. 218.

(8) *Prohibiting Officers of Corporations from Having Interest in Sale of Goods.*—A statute providing "that it shall not be lawful for any railroad or mining corporation, doing business in Allegany county, nor for the president, vice-president, manager, superintendent, any director or other officer of such corporation, to own or have any interest in any general store or merchandise business in Allegany county, in which goods, wares, and merchandise are sold, nor to conduct or carry on any such business, or have any interest in the profits of the same in Allegany county, nor to sell or barter any goods, wares, or merchandise in such county," makes an arbitrary classification, not founded upon some difference which bears a reasonable and just relation to the matter in respect to which the classification is proposed.

Luman v. Hutchens Bros. Co., (1899) 90 Md. 27, in which case the court said: "Whilst the legislature may, under conditions, create classes and subject all persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes, these classifications must

not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. It may not single out the directors of one corporation, and, solely because they are such directors, prohibit them from engaging in

some other business open to the directors of all other corporations, any more than it can by a general enactment, not passed in the exercise of the police power, burden one cor-

poration with a liability from which other corporations of the same kind under precisely similar circumstances are relieved."

el. PUBLIC OFFICE AND OFFICERS — (1) *Discriminating in Favor of and Against Public Officers* — (a) *In Favor of Officers.* — A state statute which makes the possession of policy tickets presumptive evidence against all except public officers, is not a denial of the equal protection of the laws.

Adams v. New York, (1904) 192 U. S. 599, *affirming* *People v. Adams*, (1903) 176 N. Y. 351.

(b) *Against Officers.* — A statute providing that "in prosecutions for the offenses in the next preceding section it shall be sufficient to allege generally, in the information or indictment, that any such officer * * * has made profit out of the public money in his possession or under his control, or has used the same for any purpose not authorized by law, to a certain value or amount, without specifying any further particulars in regard thereto; and on the trial evidence may be given of all the facts constituting the offense and defense thereto," does not deny to such defendants, public officers, the equal protection of the laws, as it is a statute relating wholly to offenses committed by officials, and bears equally and alike upon all.

In re Krug, (1897) 79 Fed. Rep. 311.

(2) *Compensation of Magistrates.* — An Act which provided that no justice of the peace appointed to sit in any station house in the county of Baltimore shall be entitled to receive more than forty dollars for his services in criminal cases from the county commissioners during any month, and that there shall be received by no other justice of the peace of the county more than ten dollars in criminal cases during a month, was held not to conflict with the constitutional provision, since the Act was general and applied to all justices within the stipulated classes.

Herbert v. Baltimore County, (1903) 97 Md. 639.

(3) *Civil Service Appointments.* — A statute which provides that no one holding a position by appointment or employment in the cities, counties, towns, or villages of the state, who shall serve the term required by law in the volunteer fire department in any city, town, or village in the state, shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right of such employee or appointee to a review upon a writ of certiorari, does not conflict with the constitutional provision.

People v. Folks, (1903) 89 N. Y. App. Div. 171.

f1. RELATING TO LOCAL GOVERNMENT — (1) *Rights of Municipal Corporations.* — No right, as against a state, to the equal protection of the laws is secured to its municipal corporations by this amendment, which can limit in any way legislation to charge them with public obligations. Nor have their

inhabitants, in their capacity of members of such corporations, any greater rights or immunities.

State v. Williams, (1896) 68 Conn. 156.

(2) *Legislation Operating in Limited Territorial Districts.* — The equal protection of the laws is not denied by a statute putting five towns into a class by themselves, organized into a single municipal corporation, and separated from every other town in the state by being subjected to different control in respect to highways. The regulation of municipal corporations is a matter peculiarly within the domain of state control.

Magoun v. Illinois Trust, etc., Bank, (1898) 170 U. S. 309.

Legislation operating in certain counties. — There is nothing in the National Constitution which prevents a state legislature from

enacting local laws, different in their provisions from the general code of laws for the state, and operating only in certain counties or limited territorial districts. *Davis v. State*, (1880) 68 Ala. 64.

(3) *Classification of Counties* — (a) *Regulation of Roads.* — A statute created for counties having a population of not less than seventy thousand, and not exceeding ninety thousand, a board of road commissioners, and made provision for the regulation of the roads in the counties, also concerning the management and control of workhouses in the counties. This statutory provision was held not to violate the Fourteenth Amendment on the ground of class legislation, as the operation was uniform on all counties under like circumstances, and the classification was not arbitrary.

Condon v. Maloney, (1901) 108 Tenn. 82.

(b) *Mileage of County Superintendents.* — A statute which authorized county superintendents to charge five cents mileage in counties of the first to the tenth classes, inclusive, and ten cents mileage on all counties of a higher class number than the tenth, was held not to violate the constitutional provision, and such a law cannot be said to operate unequally in the absence of a showing that the cost of travel is the same in all counties.

Henry v. Thurston County, (1903) 31 Wash. 638.

(4) *Classification of Cities* — (a) *Tenement-house Act.* — The provision of a state "Tenement-house Act," requiring all school sinks, privy vaults, etc., in existing tenement houses in cities of the first class to be removed and replaced by individual water closets, is a proper and constitutional exercise of the police power of the state for the protection of the public health. The fact that the Act is applicable only to cities of the first class, and to tenement houses only, does not offend the provision of the Fourteenth Amendment of the United States Constitution, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Tenement House Dept. v. Moeschon, (1904) 179 N. Y. 325.

(b) *In the Matter of Registration Laws.* — When the power to classify cities in the matter of registration laws, with reference to their population, has been exercised in conformity with the constitution of the state, the circumstance that

the registration law in force in one city is made to differ in essential particulars from that which regulates the conduct of elections in other cities, does not in itself deny to the citizens of that city the equal protection of the law.

Mason v. Missouri, (1900) 179 U. S. 333.

(e) **Power to Open, Widen, and Grade Streets.** — A statute provided that cities of the first class, "that have been or may be so organized since Jan. 1, 1881, shall have power to open, widen, extend, grade, construct permanent sidewalks, curb, pave, gravel, macadamize and gutter, or cause the same to be done in any manner they may by ordinance deem proper, any street, avenue, highway, or alley within the limits of such city, and may open, extend, widen, grade, park, pave, or otherwise as aforesaid improve part of any such street, highway, avenue, or alley, and levy a special tax as hereinafter provided on the lots and lands fronting and abutting on such street, highway, avenue or alley, and where said improvements are proposed to be made, to pay the expenses of the same." It was contended that the Act was unconstitutional because by its terms it limited its operation to cities of the same class "organized since Jan. 1, 1881," and that such a distinction, based alone on the date of organization, was invalid and made the Act special and partial in its operation. It was held that the constitutional provision of the United States was not violated by the Act in question.

Owen v. Sioux City, (1894) 91 Iowa 190.

(d) **Regulating Keeping of Dairies.** — A statute which regulates the condition of places where cows are kept, is not unconstitutional as discriminating, because of its limited application to certain parties supplying milk to certain cities, towns, or villages.

State v. Broadbelt, (1899) 89 Md. 565, the court saying: "The ultimate object of the statute was * * * to protect the health of persons living in cities, towns, and villages, from the disease to which impure or contaminated milk might expose them. There is a definite and well-ascertained class of persons described in the statute, and that class comprises dairymen, herdsman, and other individuals who supply milk to cities, towns, and villages. It was not the purpose of the Act to include within its purview all persons who sell milk; but it put into a class all dairymen, herdsman, and individuals who supply milk to cities, towns, and villages — those who are engaged in the business of selling milk in populous communities. These persons are

singled out from all others who may own cows, or who may occasionally sell milk in the country to some individual, and are grouped into a class, because they are the persons whose carelessness, whose inattention to their herds, or whose uncleanly surroundings may originate or promote the spread of disease in populous localities. No dairyman, herdsman, or individual who supplies milk to cities, towns, or villages is exempted from the operation of the law, but all who are thus engaged are specifically included. There is no uncertainty as to the persons composing the class, and no dispute that the general assembly intended to make exactly that classification."

(5) **Annexation of Territory to Municipal Corporations.** — A state statute authorizing any city of a certain class to add to and make a part of that city, by ordinance, any territory adjoining or touching the city limits, and providing "but nothing in this Act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," does not make an unconstitutional distinction between tracts of agricultural lands and lands used for other purposes.

Clark v. Kansas City, (1900) 176 U. S. 114. See also Taggart v. Claypool, (1896), 145 Ind. 590; Lewis v. Brandenburg, (1898) 105 Ky. 14.

Favoring farm lands in extending city boundaries.—A Kansas statute authorizing municipal corporations to extend the city boundaries under conditions named, but exempting agricultural lands from its operation, does not violate this amendment. Kansas City v. Union Pac. R. Co., (1898) 59 Kan. 430, in which case the court said: "Manufacturing and other industrial institutions, such as railway yards, round houses, grain elevators, and the like, are often situated

beyond the limits of city population. Ordinarily in such cases they are immediately adjoining it. In and around such places many persons are employed at labor, both day and night, and the necessity for the inclusion of such places within city boundaries is just as great as though they formed parts of the residence and business portions of the city. To say that the tracts of land upon which these industrial institutions are situated may not be included within city boundaries and subjected to municipal control, because an adjoining tract of land used for farming purposes, but equally as near to the heart of the city, is not likewise brought within the city limits, is a claim, to us, unheard of before."

g1. **VESTING DISCRETION IN MUNICIPAL COUNCIL AND OFFICERS** (see also *Discretion in Officers to Permit Use of Wooden Buildings, supra*, p. 568; *Regulating Taking of Ice from Public Waters, infra*, p. 603; *Discretion in Issuing Licenses, infra*, p. 624) — (1) *To Contract for Construction of Street Railroads.*—A state statute authorizing a rapid-transit board to contract "with any person, firm, or corporation which in the opinion of the board shall be best qualified to fulfill and carry out such contract, for the construction of such road or roads upon the routes and in accordance with the plans and specifications so adopted, for such sum or sums of money, to be raised and paid out of the treasury of said city, as hereinafter provided, and on such terms and conditions not inconsistent with the aforesaid plans and specifications as said board shall determine to be best for the public interest," does not deny to any one the equal protection of the law, as no particular person, class of persons, or corporation is excluded from the privilege of contracting for the construction and operation of the proposed railroad, but all may compete.

Underground R. Co. v. New York, (1902) 116 Fed. Rep. 952, *affirmed* (1904) 193 U. S. 416.

(2) *Regulation of Wooden Buildings.*—Where an ordinance was passed prohibiting the alteration or repair of wooden buildings within designated fire limits, without the permission of a majority of the fire wardens in writing, and approved by a majority of the committee on fire departments and the mayor, it was held to be unconstitutional.

Ex p. Fiske, (1887) 72 Cal. 125.

(3) *Regulation of Use of Highways.*—Where a city council is authorized by statute to regulate the use of streets and prevent obstructions being placed thereon, it may, by ordinance, prohibit the moving of buildings into and upon any of its highways without permission, and may designate an officer or committee to grant permission, upon application therefor, on proper occasions. Such an ordinance comes within the police power of the state, and does not deny to the citizen "the equal protection of the laws."

Eureka City v. Wilson, (1897) 15 Utah 53.

(4) *Stabling More than Two Horses.*—An ordinance prohibiting the stabling of more than two horses except by those obtaining permission, is unequal

in its operation and hence void because repugnant to the Fourteenth Amendment to the Constitution of the United States.

State v. Kuntz, (1895) 47 La. Ann. 106, citing *State v. Mahner*, (1891) 43 La. Ann. 496; *State v. Dulaney*, (1891) 43 La. Ann. 500; *Yick Wo v. Hopkins*, (1886) 118 U. S. 356.

(5) *Erection of Cow Stables.* — Vesting in a municipal assembly the power to permit the erection of dairy and cow stables to certain persons, is not such a discrimination in favor of such persons and against all other persons as to be a denial to all the disfavored class of the equal protection of the laws.

Fischer v. St. Louis, (1904) 194 U. S. 370.

(6) *Permitting Street Processions.*

A municipal ordinance which provided "it shall be unlawful for any person or persons, society, association, or organization, under whatsoever name, to march or parade over or upon" certain streets (therein named) in the city of Portage, "shouting, singing, or beating drums or tambourines, or playing upon any other musical instrument or instruments, for the purpose of advertising or attracting the attention of the public, or to the disturbance of the public peace or quiet, without first having obtained a permission to so march or parade, signed by the mayor of said city. In case of illness or absence of the mayor or other officer hereby designated of

the city, such permission may be granted and signed by the president of the council, city clerk, or marshal, in the order named; provided, that this section shall not apply to funerals, fire companies, nor regularly organized companies of the state militia; and provided, further, that permission to march or parade shall at no time be refused to any political party having a regular state organization. Any person violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not less than two dollars or more than ten dollars," was held to be unconstitutional. *State v. Dering*, (1893) 84 Wis. 585.

41. *ANTI-TRUST LAWS.* — A state anti-trust law which contains no discriminating features, or the discriminating features of which are held by the Supreme Court of the state to be invalid, is not invalid as depriving any person or corporation of the equal protection of the laws.

National Cotton Oil Co. v. Texas, (1905) 197 U. S. 133.

All state anti-trust legislation must be made to apply to all classes of persons and corporations alike. *Union County Nat. Bank v. Ozan Lumber Co.*, (1904) 127 Fed. Rep. 212.

Exempting agricultural products and live stock. — An *Illinois* anti-trust Act was held to be unconstitutional because it declared that "the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The court said: "It will be seen that, so far as the statute is concerned, two or more agriculturists or two or more live stock raisers may, in respect of their products or live stock in hand, combine their capital, skill, or acts for the purpose of creating or carrying out restrictions in the sale of such products or live stock; or limiting, increasing, or reducing their price; or preventing competition in their sale or purchase; or fixing a standard or figure whereby the price thereof to the public may be controlled; or making contracts whereby they would become bound not to sell or dispose of such agricultural products or live stock below a common standard figure or card or list price; or establishing the price of such products or stock in hand, so as to preclude free and un-

restricted competition among themselves or others; or by agreeing to pool, combine, or unite any interest they may have in connection with the sale or transportation of their products or live stock that the price might be affected. All this, so far as the statute is concerned, may be done by agriculturists or live stock raisers in *Illinois* without subjecting them to the fine imposed by the statute. But exactly the same things, if done by two or more persons, firms, corporations, or associations of persons, who shall have combined their capital, skill, or acts, in respect of their property, merchandise, or commodities held for sale or exchange, is made by the statute a public offense, and every principal, manager, director, agent, servant, or employee knowingly carrying out the purposes, stipulations, and orders of such combination is punishable by a fine of not less than two thousand nor more than five thousand dollars." *Connolly v. Union Sewer Pipe Co.*, (1902) 184 U. S. 553, affirming *Union Sewer-Pipe Co. v. Connolly*, (1900) 99 Fed. Rep. 354. See also *In re Grice*, (1897) 79 Fed. Rep. 637, reversed in *Baker v. Grice*, (1898) 169 U. S. 284, on the ground that no such urgency was shown as to justify a federal court releasing on *habeas corpus* a person held on a process of a state court, and that the petitioner should be left to the regular course of justice in the state court and the remedy by writ of error from

the United States Supreme Court; and *Brown v. Jacob's Pharmacy Co.*, (1902) 115 Ga. 429. But see *State v. Schlitz Brewing Co.*, (1900) 104 Tenn. 715.

Exempting associations of laboring men. — A *Nebraska* statute declared that any combination of capital or skill, or acts by which persons seek to fix the price of any article, commodity, use, or merchandise with the intent to prevent others in a like business or occupation from conducting the business or occupation, is a trust, and especially so as to any of the following things: restrictions in trade; to limit the production or increase or reduce the price of any commodity; to prevent competition in insurance, or in the making, transportation, sale, or purchase of any article; to fix any standard whereby its price to the public shall in any manner be established; to enter into any contract

by which a party is not to deal in any article below a certain price, or by which the parties agree to keep the price at any sum. The statute declared that any persons violating the statute should be conspirators, and punished accordingly, and that any corporation of the state violating the statute should have its corporate existence declared forfeited by suit; and it exempted any assembly or association of laboring men from the provisions of the statute. It was held that the statute was invalid as a denial of the equal protection of the laws. "On one side, by this legislation, we have organized labor. Those men are not amenable to the statute. On the other side we have men who do not belong to organized labor — farmers, merchants, professional men, laborers, as well as all others." *Niagara F. Ins. Co. v. Cornell*, (1901) 110 Fed. Rep. 823.

ii. RELATION OF EMPLOYER AND EMPLOYEE — (1) *Regulating Hours of Labor* — (a) **Eight-hour Law for Mines and Smelters.** — A statute providing that the period of employment of workmen in all underground mines or workings, and in smelters and all other institutions for the reduction or refining of ores or metals, should be eight hours per day, except in cases of emergency where life or property is in imminent danger, is not a denial of the equal protection of the laws. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees; and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

Holden v. Hardy, (1898) 169 U. S. 380, affirming *State v. Holden*, (1896) 14 Utah 71. See also *Ex p. Boyce*, (1904) 27 Nev. 299.

(b) **Eight-hour Law Applicable to State and Municipal Contracts.** — A state statute declaring that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of eight hours each day, and inflicting punishment upon those who are embraced by such regulations and yet disregard them, does not deny to any one the equal protection of the laws.

Atkin v. Kansas, (1903) 191 U. S. 222.

A *New York* statute which prohibited any person or corporation contracting with the state or a municipal corporation from requiring more than eight hours' work for a day's labor, and making a violation thereof a misdemeanor punishable by fine and the forfeiture of the contract, was held to be unconstitutional since it was not in relation to the public health, morals, or order, and could

not be upheld as a valid and constitutional exercise of the powers vested in the legislature. As it applies only to the case of a contract with the state or a municipality, it creates an arbitrary distinction between persons contracting with the state or a municipality and other employers of labor, thus violating the Constitution. *People v. Orange County Road Constr. Co.*, (1903) 175 N. Y. 84, reversing (1902) 73 N. Y. App. Div. 580.

(2) ***Regulating Payment of Wages.*** — A statute entitled "An Act to provide for the protection of servants and employees of railroads," relating to the payment of unpaid wages without abatement or deduction on discharge of an employee, does not deny the equal protection of the laws, as it rests on reasons

deduced from the peculiar character of the business of the corporations affected, and the public nature of their functions, and applies to all alike.

St. Louis, etc., R. Co. v. Paul, (1899) 173 U. S. 408, *affirming* (1897) 64 Ark. 83.

At least once a month and giving lien.— A state statute requiring every corporation in the state to pay at least once a month to each and every employee employed by such corporation the wages earned by such employee during the preceding month, giving a lien on all the property of the corporation for the amount of their wages, such lien taking preference over all other liens except duly recorded mortgages or deeds of trust, and a reasonable attorney's fee in any action to recover the amount of such wages, does not deny to corporations the equal protection of the laws within the meaning of this amendment. *Skinner v. Garnett Gold Min. Co.*, (1899) 96 Fed. Rep. 737.

Wages scrip to be redeemable in money.— A *West Virginia* statute prohibiting any cor-

poration, company, firm, or person engaged in any trade or business, either directly or indirectly, to issue, sell, give or deliver to any person employed by such corporation, company, firm, or person, in payment of wages due such laborer, or as advances for labor not due, any scrip, token, draft, check, or other evidence of indebtedness payable or redeemable otherwise than in lawful money; and providing that if such scrip, token, draft, check, or other evidence of indebtedness be so issued, sold, given, or delivered to such laborer, it shall be construed, taken, and held in all courts and places to be a promise to pay the sum specified therein in lawful money by the corporation, company, firm, or person issuing, selling, giving, or delivering the same to the person named therein or to the holder thereof, was held not to be so plainly and obviously in violation of the Constitution as to justify a court to declare it void. *State v. Peel Splint Coal Co.*, (1892) 36 W. Va. 802.

(3) *Regulating Screening and Weighing Coal.*— A statute relating to weighing and measuring coal at the place where mined, before the same is screened, providing that all coal mined and paid for by weight shall be weighed in the car in which it is removed from the mine, before it is screened, and shall be paid for according to the weight so ascertained, at such price per ton as may be agreed on by such owner or operator and the miners who mined the same; and coal mined and paid for by measure shall be paid for according to the number of bushels marked upon each car in which it is removed from the mine, and before it is screened, and the price paid for each bushel so ascertained shall be such as may be agreed on as aforesaid, was held not to be so plainly and obviously in violation of the Constitution as to justify a court to declare it void.

State v. Peel Splint Coal Co., (1892) 36 W. Va. 802.

(4) *Prohibiting Employment Agencies Furnishing Names to Take Places of Strikers.*— A state Act which provided that in no case shall a superintendent of any free employment office created by the Act furnish, or cause to be furnished, workmen or other employees to any applicant for help; whose employees are at that time on strike or locked out, nor shall any list of names and addresses of applicants for employment be shown to any employer whose employees are on strike or locked out, nor shall such list be exposed where it can be copied or used by the employer whose employees are on strike or locked out, was held to be unconstitutional.

Mathews v. People, (1903) 202 Ill. 389, wherein the court said that the statute makes a discrimination between different classes of citizens founded on no justifiable ground, and is an attempt to exercise legislative power in behalf of certain classes, and against other classes, whether laborers seeking work or employers, and falls under the condemnation of the Constitution. It draws an unwarrantable distinction between workmen who apply for situations to employers where there is no

strike or lockout, and workmen who do not so apply, and it also draws an unwarrantable distinction between employers who may have the misfortune to be the victims of a strike or lockout and employers who do not have such misfortune. That is to say, the statute does not relate to persons and things of a class, and to all employers, but only to those who have been the victims of strikes or lockouts.

j1. REGULATING PRIORITIES — (1) Claims of Resident Creditors.—A state statute which subordinates the claims of private business corporations, not within the jurisdiction of the state, to the claims of creditors residing in the state, is not a denial of the equal protection of the laws secured to persons within the jurisdiction of the state.

Blake v. McClung, (1898) 172 U. S. 261.
See also Blake v. McClung, (1900) 176 U. S. 59.

A state statute which provides that "creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other

country or countries, and also over mortgage or judgment creditors, for all debts, engagements, and contracts which were made or owing by said corporation previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments," does not deny to any person the equal protection of the laws. Sully v. American Nat. Bank, (1900) 178 U. S. 299.

(2) Judgment Against Corporation Prior Lien to Mortgage.—A statute which provides that "a judgment against any railway corporation for any injury to person or property, or for material furnished, or work or labor done upon any of the property of such corporation, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed provided for in this Act," is not void for depriving a railway company of the equal protection of the laws in that it embarrasses the corporations in raising money to build railroads while natural persons labor under no such disabilities with the view of facilitating the construction of railways. Corporations organized for that purpose are given privileges under the statute not given to a natural person. They stand upon a different footing, and ought not to complain because different laws are made applicable to them.

Gilchrist v. Helena, etc., R. Co., (1893) 58 Fed. Rep. 710.

An Iowa statute which provided that a judgment for any injury to any person or property against a railroad should be a lien

on the property of the company superior to the lien of any mortgage or trust deed executed since July 4, 1862, was held not to be unconstitutional. Central Trust Co. v. Sloan, (1885) 65 Iowa 655.

(3) Right of Miners to Priority of Lien for Labor.—A statute which provides that in all coal mines in the state, the miners and other persons employed and working in and about the mines, and the owners of the land and others interested in the rental or royalty of the coal mined therein, shall have a lien on said mines and all machinery and fixtures connected therewith, for work and labor performed within two months, and such liens shall be paramount to and have priority to all other liens, except the lien of the state for taxes, also priority as against each other in the order in which they accrue, and for labor over that for royalty on coal, is constitutional.

Warren v. Sohn, (1887) 112 Ind. 213.

(4) Liens for Supplies to Corporations.—A statute which gave a lien superior to deeds of trust, etc., to parties who furnish supplies to manufacturing corporations was held to be constitutional.

Virginia Development Co. v. Crozer Iron Co., (1893) 90 Va. 126, the court saying: "The statute makes no discrimination against any corporation brought under its

influence, but treats all alike under similar conditions; and that is decisive of the question. With the wisdom or unwisdom, the justice or injustice, of the statute we have

nothing to do. It was for the legislature to say whether its operation should extend to all persons and corporations, or to those cor-

porations only which are specially mentioned; and the discretion of the legislature in the matter is not subject to judicial interference."

(5) *Priority of Building and Loan Mortgages.* — A statute giving to mortgages of mutual building and loan associations priority over other liens upon the mortgaged premises and the buildings and improvements thereon, filed subsequent to the recording of the mortgage, is valid.

Julien v. Model Bldg., etc., Assoc., (1902) 116 Wis. 79.

k1. **SUNDAY LAWS.** — A state statute providing that "all labor on Sunday is prohibited, excepting the works of necessity or charity. In works of necessity or charity is included whatever is needful during the day for good order, health, or comfort of the community: *provided, however*, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity," is not in conflict with the Federal Constitution. It cannot be held that the classification was so palpably arbitrary as to be invalid in declaring that, as a matter of law, keeping barbers' shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor that question is left to be determined as one of fact.

Petit v. Minnesota, (1900) 177 U. S. 165.

Prohibiting barbering. — A statute which makes it a crime to carry on the business of barbering on Sunday does not violate the constitutional provision. *Ex p. Northrup*, (1902) 41 Oregon 489.

An Act of the state of *New York* which made it a misdemeanor to carry on or engage in the work of a barber on the first day of the week, except in the city of New York or the village of Saratoga, where such work may be performed in the forenoon of such day, was held to be constitutional. *People v. Sheriff*, (Supm. Ct. Spec. T. 1895) 13 Misc. (N. Y.) 587, the court saying: "It will be observed that so far as the statute permits

the business of a barber to be carried on on Sunday, it does so within certain defined localities, and within such localities all barbers are treated alike. Such a statute does not fall within the prohibition of the Fourteenth Amendment."

A Louisiana statute, known as the Sunday Law, requiring the closing of all places of business, with the exception of certain designated classes, from twelve o'clock on Saturday night until twelve o'clock on Sunday night of each week, and punishing violations thereof by criminal penalties, is valid. *State v. Judge*, (1887) 39 La. Ann. 136. See also *State v. Fernandez*, (1887) 39 La. Ann. 538.

l1. **GAME AND FISH LAWS** (see also *Prohibiting Fishing by Chinese Aliens, supra*, p. 571) — (1) *Regulating Hunting and Selling Game.* — A statute which provides that "every person who buys, sells, offers, or exposes for sale, barter, or trade, any quail * * * is guilty of a misdemeanor," is constitutional.

Ex p. Kenneke, (1902) 136 Cal. 527. In this case it was said: "There is no arbitrary discrimination in the law which would make it obnoxious to the Fourteenth Amendment or to any provision of our state constitution; there is no discrimination in it whatever. Under the law all persons have the same right to kill quail within certain limitations, and it provides that 'every person who buys, sells, etc., any quail, shall be guilty, and does not give to any person the right to so buy or sell.'"

The provision of the *Illinois Game Law* of 1899 which enacted that the purchaser of seized game is entitled to a certificate of purchase from the constable, giving him the legal

title to game sold, does not render the Act contrary to the constitutional provision. *Meul v. People*, (1902) 198 Ill. 258, the court saying: "All persons are alike free to attend the sale and to become bidders and to acquire the right to be enjoyed by the successful bidder at the sale. No discrimination is exercised and no privilege arbitrarily bestowed on one citizen which is denied another; that is to say, every citizen may become a purchaser, and every purchaser possesses equal rights in that which he has bought. The fact that persons who might have become purchasers but did not do so do not acquire the rights which purchasers may enjoy under the Act, has no effect to bring the Act within the condemnation of the amendment. for no

one is thereby denied the equal protection of the law."

A statute of *Arkansas* which provided that it shall be unlawful for any person who is a nonresident of the state of *Arkansas* to

shoot, hunt, fish, or trap at any season of the year, was held to be unconstitutional in so far as it prohibited a nonresident owner of land situated in the state from enjoying the same property rights as residents. *State v. Mallory*, (Ark. 1904) 83 S. W. Rep. 955.

(2) *Regulating Catching Fish*. — Where the manner and times of catching fish are regulated by a statute, the statute is not unconstitutional as class legislation because the regulations are different for different waters, or because there are certain regulations applicable to particular localities or waters only, or because certain waters are exempted from all regulation.

Bittenhaus v. Johnston, (1896) 92 Wis. 588.

See *infra*, *Statutes and Ordinances Directed against Chinese — Prohibiting Fishing by Chinese Aliens*, p. 571.

(3) *Requiring License Fee of Nonresidents*. — A state statute regulating the manner and seasons in which hunting and fishing should be pursued in the state, in which the privileges of residents of that state were distinguished from those of nonresidents, in that the latter were required to pay a license fee of ten dollars, which license fee was not required of residents, is not a denial of the equal protection of the laws, as applied to the case of a nonresident who is a stockholder in a domestic corporation owning land in the state under a charter authorizing the corporation to acquire and own real estate within the state, and to use the same as a game and fish preserve.

In re Eberle, (1899) 98 Fed. Rep. 295.

m1. REGULATING TAKING OF ICE FROM PUBLIC WATERS.

The right to take ice from public waters within a state being a possession of all the people thereof, a law which prohibits the cutting of ice from any meandered lake of the state, for shipment out of the state, ex-

cept by those permitted to do so by a license issued by the secretary of state in the manner prescribed, violates this clause. *Rossmiller v. State*, (1902) 114 Wis. 170.

n1. REGULATING PRACTICE OF MEDICINE — (1) *In General*. — A statute making it indictable to practice medicine and surgery without an examination by the state board of medical examiners and a license therefrom, which was made prospective so as to apply only to those who should begin the practice of medicine and surgery thereafter, is valid, as it applies equally to all persons in the same class, and ordinarily the legislature is the sole judge of the classification.

State v. Call, (1897) 121 N. Car. 646. See also *People v. Phippin*, (1888) 70 Mich. 6; *State v. Carey*, (1892) 4 Wash. 424; *State v. Currens*, (1901) 111 Wis. 433.

Exempting physician called from another state. — The Act of *Maine* of 1895, entitled

"An Act to regulate the practice of medicine and surgery," which exempts "a physician or surgeon who is called from another state to treat a particular case, and who does not otherwise practice in this state," was held to be constitutional. *State v. Bohemier*, (1902) 96 Me. 257.

As Affecting Christian Scientists. — A statute regulating the practice of medicine in the state, which exacts reasonable qualifications, and excludes no one possessing them, is not void as discriminating against Christian Scientists in that it prescribes that any one possessing certain qualifications may practice oste-

opathy, and does not make especial provision for those who wish to practice Christian Science.

State v. Marble, (1905) 72 Ohio St. 21.

As Affecting a Magnetic Healer. — A statute regulating the practice of medicine does not deny a magnetic healer the equal protection of the laws in exempting physicians and surgeons legally qualified to practice in the state in which they reside, when in consultation with a legal practitioner of the enacting state; or physicians and surgeons residing on the border of a neighboring state, and authorized to practice under the laws thereof, whose practice extends into the limits of the enacting state; or opticians and practitioners of osteopathy.

Parks v. State, (1902) 159 Ind. 212.

(2) *Requiring Physicians to Report Contagious Diseases.* — A municipal ordinance providing that "every physician, or person acting as such, who shall have any patient within the limits of said city sick with smallpox or varioloid or other infectious or pestilential disease, shall forthwith report the fact to the mayor, or to the clerk of the board of health, together with the name of such patient and the street and number of the house where such patient is treated; and in default of so doing shall forfeit and pay not exceeding fifty dollars for each and every such offense," is not invalid as putting upon physicians, as a class, a public burden.

State v. Wordin, (1888) 56 Conn. 224.

01. **SUNDRY MATTERS CONCERNING ALLEGED DISCRIMINATIONS** — (1) *Exclusion of Unvaccinated Children from Public Schools.* — Where a school committee, under authority of law, passed a vote which excluded from the public schools children who had not been properly vaccinated, it was held that the law did not violate the constitutional provision.

Bissell v. Davison, (1894) 85 Conn. 183, wherein the court said: "The duty of providing for the education of the children within its limits, through the support and maintenance of public schools, has always been regarded in this state in the light of a governmental duty resting upon the sovereign state. It is a duty not imposed by constitutional provision, but has always been assumed by the state, not only because the education of youth is a matter of great public utility, but also and chiefly because it is one of great public necessity for the protection and welfare of the state itself. In the performance of this duty, the state maintains and supports, at great expense, and with an ever watchful solicitude, public schools throughout its territory, and secures to its youth the privilege of attendance therein. This is a privilege or advantage rather than a right in the strict technical sense of the term. This privilege is granted and is to be enjoyed upon such terms and under such reasonable conditions and restrictions as the law-making power, within constitutional limits, may see fit to impose; and within those limits

the question what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools is a question solely for the legislature, and not for the courts."

The legislature has a right to impose any reasonable regulation, provided that it will operate equally upon all persons in the same class and under the same conditions, in reference to attending the public schools. A law of New York which prohibited the attendance of children in the public schools without first having been vaccinated, was held to be a proper exercise of the police power, and therefore constitutional. *Viemeister v. White*, (1903) 88 N. Y. App. Div. 44, *affirmed*, (1904) 179 N. Y. 235, the court saying: "When the law operates equally upon all; when the rule of conduct is uniform throughout the state, affecting alike the legislator, his family, his neighbors, and friends, the presumption lying at the foundation of representative government is that the legislature will act wisely and in the interest of all of the people."

(2) *Compensation for Injuries on Change in Grade of Streets.* — The constitutional provision is violated, when the charter of the city of Milwaukee provides that where any street has been graded and the grade established, any lot owner injured by a subsequent alteration shall be entitled to compensation, by a law of Wisconsin, entitled "An Act to authorize the city of Milwaukee to change the grade of streets," which empowers the alteration of grades established within a certain district, imposing a certain number of obligations, without compensation being provided for consequential injuries.

Anderton v. Milwaukee, (1892) 82 Wis. 279, the court saying: "If the legislature had power thus to take away from the lot owners in forty-nine particular blocks of the city such rights of property so permanently secured to them by the charter, and at the same time leave such chartered rights un-

impaired as to all other lot owners in the city, then the legislature has the same power as to the lot owners in a single block, or even as to the owner of a single lot in a block. It is one of the purposes of American constitutional law to prevent all such special class legislation."

(3) *Prohibiting Public Speaking on Public Grounds.* — Rules adopted for the government of a public park prohibiting the making of orations therein, which rules were enacted under authority to govern and regulate any park laid out under the statute, and to make rules for the use and government thereof, and for breaches of such rules to prescribe penalties, are not contrary to the constitutional provision.

Com. v. Abrahams, (1892) 156 Mass. 57.

(4) *Requiring Labor for Repair of Public Highways.* — Statutes and ordinances requiring two days' work on the streets of cities from each male person between twenty-one and forty-five years of age, or three dollars in lieu thereof, are not unconstitutional or void because the work or the payment of the money is imposed on only a class of persons and not on all persons.

State v. Topeka, (1886) 36 Kan. 76.

(5) *Liability of County for Injuries from Defects in Highways.* — A statute which provides that any person who shall receive bodily injury or damage to his person or property through a defect in the repair of a highway, causeway, or bridge, may recover, in an action against the county, the amount of damages fixed by the finding of the jury, does not conflict with this clause of the Constitution.

Blum v. Richland County, (1892) 38 S. Car. 291, citing *McCandless v. Richmond*, etc., R. Co., (1892) 38 S. Car. 104.

(6) *Findings of Facts by State Officers.* — Findings of fact by a state officer, whose duty it is to attend to the enforcement of all the laws against fraud and adulteration or impurities in food, drink, or drugs, do not in themselves constitute a denial of the equal protection of the law.

Arbuckle v. Blackburn, (1903) 191 U. S. 414.

(7) *Prohibiting Certain Forms of Gambling* — (a) *Sales on Margin or for Future Delivery.* — A state constitution declaring void all contracts for the sales of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, does not deprive persons of the equal protection of

the law in discriminating against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched.

Otis v. Parker, (1903) 187 U. S. 608, affirming (1900) 130 Cal. 322.

Dealing in futures.—The constitutional provision is not violated by a *North Carolina* statute which prohibits dealing in futures where there is no intention of delivery, because the Act does not apply to persons, corporations, etc., purchasing or selling necessary commodities required in the usual course

of business. *State v. McGinnis*, (1905) 138 N. Car. 724; *State v. Gatewood*, (N. Car. 1905) 51 S. E. Rep. 53.

Prohibiting grain options.—An Act of *Illinois* which makes grain option contracts gambling contracts, and a criminal offense, was held to be a constitutional regulation. *Booth v. People*, (1900) 186 Ill. 43.

(b) **Book-making and Pool-selling.**—A statute which provides that every one shall be guilty of a misdemeanor who keeps rooms for book-making and pool-selling, upon the result of any trial or contest of skill, speed, or power of endurance of man or beast, which is to take place beyond the limits of the state, or who makes books or sells pools on such events, or who makes books or sells pools on the result of any political nomination, appointment, or election wherever made or held, or who makes books or sells pools to minors on such events, does not deny the equal protection of the laws.

State v. Burgdoerfer, (1891) 107 Mo. 34.

(8) ***Mechanic's Lien Law.***—A statute which gave a lien to subcontractors to the amount of their claims for labor and material without regard to the price of the contract and the sum due from the owners to the principal contractor, but enacted that the principal contractor should defend suits to enforce such lien, and authorized a remedy on the part of the owner against him, was held to be constitutional.

Mallory v. La Crosse Abattoir Co., (1891) 80 Wis. 170. See also *Barrett v. Millikan*, (1901) 156 Ind. 510.

(9) ***Exempting Wages from Process.***—A statute subjects any person to fine and imprisonment who sends out of the state, etc., any note, etc., account, etc., for the purpose of instituting any suit thereon in a foreign jurisdiction against a resident of the state, for the purpose of having execution, attachment, garnishment, etc., issued in such suit, or upon a judgment rendered in such suit, against the wages of a resident of the state, and having such process served upon any corporation subject to the processes of the courts of the state, which is indebted to a resident of the state for wages. In separating wage earners from other classes, the law denies to the creditors of such persons the equal protection of the laws enjoyed by creditors of other classes.

In re Flukes, (1900) 157 Mo. 127.

(10) ***Exempting Certain Negotiable Paper from Attachment.***—A statute provides generally that negotiable paper may be attached by trustee process before notice of transfer. It provides further, however, that negotiable paper actually transferred to a bank in the state before due shall be exempt from such attachment. This leaves paper transferred to a bank without the state to be governed by the general provision. Such a statute does not violate this constitutional provision.

Hawley v. Hurd, (1900) 72 Vt. 122.

(11) *Prohibiting Tenant Leaving During Term.* — A statute which makes it a penal offense, where a person, who has "contracted in writing to labor for or serve another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with the party furnishing lands, or the lands and teams to cultivate it, either to furnish the labor, or the labor and teams, to cultivate the lands," afterwards, without the consent of the other party, and without sufficient excuse, to be adjudged by the court, "shall leave such other party or abandon said contract, or leave or abandon the leased premises or land as aforesaid," and take employment of a similar nature from another person, without first giving him notice of the prior contract, was held to be unconstitutional. "It is unjust discrimination against a class, and the denial of 'the equal protection of the law' to laborers, and renters who contract to cultivate crops. It attaches consequences to the breaches of their contract obligations, and erects barriers to their right to pursue their usual callings, which are raised up by law against no other class of men under like circumstances."

Charge to grand jury in Peonage Cases, (1903) 123 Fed. Rep. 691.

(12) *Regulation of Business of Homestead Associations.* — A statute regulating the business of homestead associations, and declaring that transactions with them purporting to be sales shall be so considered, which is applicable to all persons who may choose to form such associations, or engage in such transactions with them, does not deny to any person the equal protection of the laws.

American Homestead Co. v. Karstendiek, (1903) 111 La. 884.

(13) *Registration of Certain Classes of Dogs.* — Regulations may be passed restricting or prohibiting the running at large of dogs in cities, and the owners may be required to register the same. Dogs in cities may be classified, and the owners thereof may be required to register all the dogs of one class and not the dogs of another class, and to pay a greater registration fee for the dogs of one class than for those of another class; and such owners may also be required to put collars around the necks of their dogs, and any dog found running at large in a city in violation of the statutes or ordinances may be summarily destroyed. Such regulations are constitutional, and deny to no one the equal protection of the laws.

State v. Topeka, (1886) 36 Kan. 76.

(14) *Prohibiting Using Unregistered Docked Horses.* — A statute providing that "it shall be unlawful for any person or persons to dock the tail of any horse, within the state of Colorado, or to procure the same to be docked, or to import or bring into this state any docked horse or horses, or to drive, work, use, race, or deal in any unregistered docked horse or horses within the state of Colorado," and requiring the registration of horses docked at the time of the adoption of the statute, by operating upon that class of persons who use

unregistered docked horses, does not deny to any person the equal protection of the laws.

Bland v. People, (1904) 32 Colo. 332.

(15) *Requiring Use of Particular Petroleum Lamp*.—A state statute provides that "if any person sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of not less than one hundred and five degrees standard Fahrenheit thermometer, closed test, except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in the Welsbach hydrocarbon incandescent lamp, he shall be punished." It was held that the statute was invalid, as it appeared that there were other lamps operated on the same general principle as the Welsbach, that they were equally safe, and that they secured the same results.

State v. Santee, (1900) 111 Iowa 2.

p1. STATE TAXATION—(1) *Equality*—(a) *In General*.—In respect of taxation this amendment was not intended to compel a state to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class.

Giozza v. Tiernan, (1893) 148 U. S. 662. See also *Kersey v. Terre Haute*, (1903) 161 Ind. 471.

Uniformity of taxation for all classes in the state is not a right or privilege guaranteed by the Constitution of the United States or any of its amendments. On the contrary, it is the settled rule of the national courts that each state possesses the undoubted power, in the absence of any limitation contained in its own organic Act, to determine for itself the manner and mode of taxation, as well as the manner of the assessment of its valuation, without violating any provision of the National Constitution if it fails to provide for a uniform taxation for different classes of property. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. Rep. 633.

State constitutional rule of equality.—Whatever extension may properly be given to the provision of the Constitution which forbids the denial by a state to any person or selected number of persons within its jurisdiction, of equal protection in the enjoyment of these civil rights secured by its fundamental law to all citizens, it cannot cover the establishment by this amendment of the constitutional rule of "equality in taxation." The broad dictum of the United States court, speaking by Mr. Justice Miller, that while state constitutions may contain provisions against unequal taxation, "the Federal Constitution imposes no restraints on the states in that regard" (*Davidson v. New Orleans*,

(1877) 96 U. S. 97, 105), has been fully confirmed by the logic of recent decisions. *State v. Travelers Ins. Co.*, (1900) 73 Conn. 255, affirmed (1902) 185 U. S. 364.

That a tax statute, or the tax laid under a statute, is in violation of the constitution of the state, is not of itself necessarily sufficient to constitute a violation of the Fourteenth Amendment; but when, in addition to the violation of the state constitution, the statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is such class legislation and such denial of the equal protection of the laws as renders it obnoxious to the Fourteenth Amendment. And the state constitution is important in determining what the rights of the citizen are, and whether equal protection of the law is being denied. *Nashville, etc., R. Co. v. Taylor*, (1898) 86 Fed. Rep. 186.

A denial of state constitutional guaranties of equality of taxation and that all property shall be taxed according to its value would seem to be equally a deprivation of a right secured by this amendment. *Railroad, etc., Cos. v. Board of Equalizers*, (1897) 85 Fed. Rep. 317.

An attempt to make a railroad company pay on a one hundred per cent. valuation when the bulk of the taxpayers pay on not exceeding an eighty per cent. valuation, was considered sufficient to require that the court

should intervene. "Particularly is this so when it is considered that there is a possibility, at least, that the valuation of its intangible property may include the skill and efficiency with which its affairs are managed,

and the personalty of individuals not subject to equalization largely escapes taxation at all." *Louisville, etc., R. Co. v. Coulter*, (1903) 131 Fed. Rep. 312.

Taxing the Face Value of Corporate Securities does not violate this amendment.

Bell's Gap R. Co. v. Pennsylvania, (1890) 134 U. S. 238. See also *Jennings v. Coal Ridge Imp., etc., Co.*, (1893) 147 U. S. 147.

(b) **Power of Classification.** — This provision does not prevent the classification of property for taxation — subjecting one kind of property to a different rate; distinguishing between franchises, licenses, and privileges, and visible and tangible property, and between real and personal property.

Home Ins. Co. v. New York, (1890) 134 U. S. 606.

requirement. *Fraser v. McConway, etc., Co.*, (1897) 82 Fed. Rep. 258.

The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. *Bell's Gap R. Co. v. Pennsylvania*, (1890) 134 U. S. 237.

The constitutional provision is not violated by a classification of subjects liable to or exempted from taxation, provided the classification is founded on differences real in their nature and there is afforded rational ground of distinction, and the amount of the exemption is reasonable. *Black v. State*, (1902) 113 Wis. 205.

Impartial application to all constituents of each class. — The rule of equality in respect to taxation only requires the same means and methods to be applied impartially to all the constituents of each class. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. Rep. 634.

Taxation of foreign insurance companies. — A statute which taxes foreign insurance companies at a certain per cent. is constitutional, notwithstanding a different rate is imposed upon domestic companies. *Com. v. Germania L. Ins. Co.*, (1876) 11 Phila. (Pa.) 553, 33 Leg. Int. (Pa.) 169.

Must have reasonable basis. — A valid classification for the purposes of taxation must have a just and reasonable basis, and a statute which in effect imposes a tax on adult aliens employed within the state lacks that

An excise tax which operates uniformly throughout the state, and bears equally upon all persons standing in the same category, does not deprive any of the equal protection of the laws. *State v. Guilbert*, (1904) 70 Ohio St. 229.

(2) **Retroactive Taxation of Certain Property.** — There is nothing in the Federal Constitution which forbids a state to reach backward and collect taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials, without also making provision for collecting the taxes for the same years on other property.

Florida Cent., etc., R. Co. v. Reynolds, (1902) 183 U. S. 474.

A *Mississippi* statute which provided for the assessment by railroad commissioners of the property of railroads for back taxes, which commissioners were not authorized to assess property of other kinds, and there

being no provision made for an appeal from the decision of the commissioners, was held to be constitutional. *Yazoo, etc., R. Co. v. Adams*, (1900) 77 Miss. 764, the court saying: "All railroad property is dealt with alike. There is no discrimination between railroads." *Affirmed* on other grounds, (1901) 180 U. S. 26.

(3) **Discriminating Between Residents and Nonresidents** — (a) **Notices to Residents and Nonresidents.** — A statute relating to proceedings to enforce the col-

lection of taxes due on land, which requires twenty 'days' notice to be given to a resident while four weeks' notice is required to be given to a nonresident, does not discriminate against nonresidents.

Johnson v. Hunter, (1904) 127 Fed. Rep. 222.

(b) **Exempting Resident Brewers.** — A municipal ordinance, which, as construed, exempts brewers manufacturing within the city from payment of a license while imposing a tax upon nonresidents, is not void for discrimination.

Duluth Brewing, etc., Co. v. Superior, (C. C. A. 1903) 123 Fed. Rep. 357.

(c) **Exempting Nonresidents from Tax on Vehicles.** — An ordinance which imposes a tax on vehicles is not void because of a failure to provide for the taxation of all vehicles belonging to nonresidents who habitually use the streets.

Kersey v. Terre Haute, (1903) 161 Ind. 471, the court saying: "Nonresidents, as a class, it may be presumed, use the streets of the city less than residents; some nonresidents use such streets much less than other nonresidents, and the extent of the user of such streets by nonresidents must, in the nature of things, be ever varying. There

seems to have been an attempt, in the ordinance under consideration, to subject certain vehicles of nonresidents to a tax, and as to the untaxed vehicles of nonresidents, we think that the difficulty of classifying them on a reasonably just and equal basis afforded a sufficient reason, in the discretion of the council, for the omission complained of."

(4) **Discriminating Between Refiners of Own Production and General Refiners.** — A state constitution which classifies refiners of sugar, for the purpose of taxation, into those who refine the production of their own plantations and those who engage in the general refining business and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax on the latter class, does not deny to persons or corporations engaged in the general refining business the equal protection of the laws.

American Sugar Refining Co. v. Louisiana, (1900) 179 U. S. 95, *affirming* (1899) 51 La. Ann. 562.

(5) **Discriminating Between Warehouses On and Off Railroads.** — A state statute requiring a license from the owners of elevators and warehouses situated on the right of way of a railroad at one of its stations or sidings, other than at terminal points, does not deny the equal protection of the laws by reason of its nonapplication to those who own or operate elevators not situate on the right of way of a railroad.

W. W. Cargill Co. v. Minnesota, (1901) 180 U. S. 468, *affirming* *State v. W. W. Cargill Co.*, (1899) 77 Minn. 223.

(6) **Method of Assessment and Collection** — (a) **As Between Resident and Nonresident Stockholders.** — State legislation in respect to the taxation of shares of stock in a local corporation held by nonresidents, by which the nonresident pays a certain tax direct to the state and the resident pays the local tax, is not in conflict with this clause, though in a given year the actual workings of the system may result in a larger burden on the nonresident. "We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribu-

tion of burdens, and that no intentional discrimination has been made against nonresidents."

Travellers' Ins. Co. v. Connecticut, (1902) 185 U. S. 371, *affirming* *State v. Traveler's Ins. Co.*, (1900) 73 Conn. 255. See also *State v. Traveler's Ins. Co.*, (1898) 70 Conn. 590.

(b) **Different Methods for Corporations and Individuals.**—The mere fact that a state law gives the assessors in the case of a corporation two chances to arrive at the correct valuation of their real estate when they have but one in the case of individuals, cannot be held to be a denial to the corporations of the equal protection of the law so long as the real estate of the individual is in fact generally assessed at its full value. To raise such a question it is necessary to allege and prove, as a fact, that there was habitual violation of law by under-valuation.

New York v. Barker, (1900) 179 U. S. 284, *affirming* (1899) 158 N. Y. 709.

It is competent, and not in conflict with the United States Constitution, for the state to provide that any particular class of property belonging to all corporations of the same

character, and which possess the same rights and privileges, may be assessed in the same manner and by the same tribunal, and that the property of individuals and other corporations may be assessed by other officers at different times. *Central Iowa R. Co. v. Wright County*, (1885) 67 Iowa 199.

Favoring Individuals in Matter of Hearing.—A statute which allows an ordinary taxpayer, not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only one hearing before the latter board is given to railroad companies in respect to their property, does not deny the equal protection of the laws. The power of the state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings before their rights are finally determined, and to parties belonging to a different class only a single hearing.

Pittsburgh, etc., R. Co. v. Backus, (1894) 154 U. S. 427, *affirming* (1892) 133 Ind. 625. See also *Cleveland, etc., R. Co. v. Backus*, (1892) 133 Ind. 513.

By State Board and County Officials.—Legislation providing for the assessment of railroad property by a state board while all other property in the state is assessed by county officials is not repugnant to this provision.

Pittsburgh, etc., R. Co. v. Backus, (1894) 154 U. S. 425, *affirming* (1892) 133 Ind. 625. See also *Cleveland, etc., R. Co. v. Backus*, (1892) 133 Ind. 513.

(c) **Distinct Mode of Valuing Railroad Property.**—A state system of taxation by which railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies, does not deny to railroads the equal protection of the law. The right to classify railroad property, as a separate class, for purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the state in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct

scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws.

Kentucky R. Tax Cases, (1885) 115 U. S. 336. See also Owensboro, etc., R. Co., v. Daviess County, (Ky. 1887) 3 S. W. Rep. 164.

It is not only competent, but necessary in any justly framed system of taxation, to provide for different modes of taxing property, according to the different nature of the property so long as all property of the same nature and class is dealt with alike. It is nothing more than a classification of property according to its nature and uses, and dealing with it according to its revenue-bearing duties, accordingly as all property of that class is dealt with. Uniformity and equality of taxation as to the mere mode of imposing taxes, are not violated by putting all railroad property, on account of its nature and uses, and

the difficulties attending its proper assessment for taxation, in one class, and assessing it according to a special mode provided therefor by the legislature, so long as all railroads are dealt with alike, and there is, consequently, no discrimination between those in that class. Yazoo, etc., R. Co. v. Adams, (1900) 77 Miss. 764, affirmed on other grounds, (1901) 180 U. S. 26.

Assessment of railroads annually.—The provision of the Iowa Code for the assessment of railroads yearly, while the assessment of real estate is every alternate year only, was held not to be unconstitutional as a discrimination against railroads. Central Iowa R. Co. v. Wright County, (1885) 67 Iowa 199.

(a) **Distinct Mode of Valuing Bank Stock.**—A tax imposed by a municipal corporation on shares of stock in national banks under a statute which provides that such property shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere, in the assessment of all state, county, and town taxes imposed and levied in such place, and shall be assessed at its fair cash value at the same rate, and not greater than that at which other moneyed capital in the hands of citizens, and subject to taxes, is by law assessed, does not deny to banks the equal protection of laws if the rate upon the bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in a town or city where a bank is located.

Bank of Redemption v. Boston, (1888) 125 U. S. 60.

(a) **Collection by Distress and Seizure of Person.**—Collection of a tax by distress and seizure of the person does not deny to any one the equal protection of the law when the law of the state gives opportunity for objection before the tax commissioner, and if dissatisfied with the final action of the commissioner the party may have that action reviewed by certiorari, and the law operates alike on all persons and property similarly situated.

Palmer v. McMahon, (1890) 133 U. S. 669.

Summary process for taxes within certain amount.—A summary process provided by a Nevada statute for the sale of property for delinquent taxes amounting to less than three hundred dollars, was held not to deprive a person owing less than three hundred dol-

lars of the equal protection of the laws, although where the amount is more than that sum there must be a regular action in court for its collection. This is only a reasonable exercise by the legislature of the right to classify the taxpayers. Sawyer v. Dooley, (1893) 21 Nev. 390.

(7) **Exemptions from Taxation**—(a) **In General.**—If a state deem it for the best interests of its people to encourage the building of railroads by exempting their property from taxation, such exemption could not be adjudged in conflict with the Fourteenth Amendment, even though thereby the burden of taxation upon other property in the state be largely increased. And, conversely, if the state subject railroads to taxation, while exempting some other class of

property, there is nothing in this amendment to overthrow its action. The mere fact that such legislation may operate with harshness is not of itself sufficient to justify the court in declaring it unconstitutional. These matters of classification are of state policy, to be determined by the state, and the federal government is not charged with the duty of supervising its action.

Florida Cent., etc., R. Co. v. Reynolds, (1902) 183 U. S. 480.

Exempting railroad land grants from taxation.—A *North Dakota* statute providing that, in lieu of all other taxation upon the property of railroad companies, there should thereafter be paid a certain percentage of the gross earnings of such railroad companies, and thus exempting lands granted under Acts of Congress, does not deny to others, paying taxes on land, the equal protection of the laws. *Northern Pac. R. Co. v. Barnes*, (1892) 2 N. Dak. 310, followed by *Northern Pac. R. Co. v. Barnes*, (1892) 2 N. Dak. 395; *Northern Pac. R. Co. v. Strong*, (1892) 2 N. Dak. 395; *Northern Pac. R. Co. v. Brewer*, (1892) 2 N. Dak. 396; *Northern Pac. R. Co. v. Tressler*, (1892) 2 N. Dak. 397.

Exempting certain mortgages.—A statute which subjects the bonds of a corporation secured by mortgage upon property within the state to taxation in the hands of resident holders, and exempts mortgages held by individuals, and the mortgage debts, and mortgages of building associations and bonds

of corporations not bearing interest, is not unconstitutional as creating a discrimination, since the legislature has the power to create exemptions in reference to certain kinds of property. *Simpson v. Hopkins*, (1896) 82 Md. 478.

Exempting street cars and automobiles.—It is too plain to need elaboration that in the exercise of the power of classification the city council is authorized to exclude from its scheme of taxation electric street cars and automobiles. *Kersey v. Terre Haute*, (1903) 161 Ind. 471, the court saying: "These vehicles were perhaps omitted because the common council concluded that their use did not cause any substantial wear upon the pavements."

A territorial statute exempting from income tax private schools, colleges, commercial colleges, fraternal benefit societies, and fire, life, and marine insurance companies, was held not to be an unlawful discrimination. *Peacock v. Pratt*, (C. C. A. 1903) 121 Fed. Rep. 775.

(b) **Exempting Manufacturing and Mining Companies.**—A statute providing that "every corporation, joint stock company, or association whatever, now or hereafter incorporated, organized, or formed under, by, or pursuant to law in this state, or in any other state or country and doing business in this state, except only * * * manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this state, * * * shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually, to be computed as follows," does not deny to a foreign corporation manufacturing goods wholly outside the state of New York and sending them there for sale the equal protection of the laws. The tax is prescribed as well for New York corporations as for those of other states, and the exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state.

New York v. Roberts, (1898) 171 U. S. 658.

(c) **Assessing Property of Certain Corporations at Less than Value.**—Denial of the equal protection of the laws cannot be successfully asserted of the action of a state board of equalization assessing the property of railroad, bridge, telephone, telegraph, and express companies at less than the actual value, when the judgment of the board is final under the state law, as it is in the power of the state to grant an exemption or partial exemption from this tax and substitute another.

Missouri v. Dockery, (1903) 191 U. S. 170.

(d) *Certain Lands Within City Limits.*— There is no denial of the equal protection of the laws to a bridge company by the imposition of a municipal tax on its property, by a proviso in the city's charter declaring that "no land embraced within the city limits, and outside of ten-acre lots as originally laid off, shall be assessed and taxed by the city council, unless the same is divided or laid out into lots of five acres or less, and unless all of same is actually used and devoted to farming purposes."

Henderson Bridge Co. v. Henderson, (1899) 173 U. S. 620.

(8) *Exemption from Forfeiture of Tracts Less than Certain Size.*— A provision of a state constitution exempting tracts of less than one thousand acres from forfeiture by reason of the owner not having been placed or caused to be placed during five consecutive years on the proper land book for taxation, does not amount to a denial to citizens or landowners owning tracts containing one thousand acres or more, of the equal protection of the law.

King v. Mullins, (1898) 171 U. S. 436, wherein the court said: "The evil intended to be remedied by the constitution and laws of West Virginia was the persistent failure of those who owned or claimed to own large tracts of lands, patented in the last century, or early in the present century, to put them on the land books, so that the extent and boundaries of such tracts could be easily ascertained by the officers charged with the duty of assessing and collecting taxes. Where the tract was a small one, the probability was that it was actually occupied by

some one, and its extent or boundary could be readily ascertained for purposes of assessment and taxation. We can well understand why one policy could be properly adopted as to large tracts which the necessities of the public revenue did not require to be prescribed as to small tracts." But see *King v. Hatfield*, (1900) 130 Fed. Rep. 564, wherein it was held that the provision makes an unreasonable classification and discrimination, and the case was remanded (1902) 184 U. S. 162, for alleged improper practice in bringing the action.

(9) *Penalty for Nonpayment Against Certain Companies.*— A statute providing for the taxation of telegraph, telephone, and sleeping-car companies does not deny to them the equal protection of the law by a provision that, on failure to pay taxes assessed, the judgment in an action brought for their recovery shall include a penalty of fifty per cent. of the amount of taxes so assessed and unpaid.

Western Union Tel. Co. v. Indiana, (1897) 165 U. S. 304.

(10) *Assessments for Local Improvements*— (a) *In General.*— A state statute authorizing the cost of improvement of streets and other ways to be assessed against the owners of lots, and giving a lien thereon for such assessments, subjecting the power vested in the local government to the supervision of the courts where the particular facts in each case could be examined and the controversies determined by those rules and principles which have always governed courts in dealing with questions of assessment and taxation, does not deny to the owners of such lands the equal protection of the law.

Walston v. Nevin, (1888) 128 U. S. 581, affirming (1887) 86 Ky. 492.

General laws for the drainage of large tracts of swamp or low lands upon proceedings instituted by some of the proprietors of the land to compel all to contribute to the expense of their drainage, do not deny to the owners the equal protection of the law, as

the statute is applicable to all lands of the same kind. *Wurts v. Hoagland*, (1885) 114 U. S. 614.

Upon a linear foot basis.— An assessment of an apportionment warrant for street improvements upon a linear foot basis is not unconstitutional. *Augusta v. Taylor*, (Ky. 1901) 65 S. W. Rep. 837.

On property benefited.—A statute of *California* which authorizes the board of supervisors of a city to determine the part of the city which will be benefited by the widening of a street, and to assess the expense upon the specific portion of the city determined to be benefited, was held to be constitutional. *Piper's Appeal*, (1867) 32 Cal. 530.

Without regard to benefits.—An *Indiana* statute providing that the entire cost of a street improvement, except for street and alley crossings, shall be assessed against the abutting property by the frontage measurement, without any regard to the special benefits received by it, and providing for no notice and hearing to ascertain and determine the actual benefits specially received by the landowner by reason of such improvement, but the only notice and hearing provided for is one to revise and correct the report and estimate of the engineer, so as to make it conformable to the basis of assessment prescribed

in the statute, is a denial of the equal protection of the law. *Charles v. Marion*, (1900) 100 Fed. Rep. 539, (1899) 98 Fed. Rep. 166.

A *Missouri* statute authorizing the apportionment of the costs of repaving a street in cities of the third class on blocks and lots abutting thereon according to the front foot, without regard to the question of fact whether or not the given parcel of land is benefited thereby to the extent of the assessment, and without affording the property owner an opportunity to question the existence of such benefit, is in contravention of this amendment to the Federal Constitution, and is therefore void. *Fay v. Springfield*, (1899) 94 Fed. Rep. 409.

The Illinois Sidewalk Act of 1875 was held not to be unconstitutional because it did not limit the amount of the special tax to the special benefits received. *Job v. Alton*, (1901) 189 Ill. 256.

(b) Giving Residents Privilege of Protesting Against Improvements.—A state statute, making tax bills levied to pay the contract price for local improvements a lien upon the real estate, and providing that if a majority of the resident owners of the property liable to taxation therefor shall file with the city clerk a protest against such improvement, the improvement is not to be made, which privilege of protest is not given to nonresident owners, is not such a discrimination against the nonresident owners as to constitute a denial to them of the equal protection of the law.

Field v. Barber Asphalt Paving Co., (1904) 194 U. S. 620, wherein the court said: "The alleged discrimination is certainly not an arbitrary one; the presence within the city of the resident property owners, their direct interest in the subject-matter, and their ability to protest promptly if the means em-

ployed are objectionable, place them on a distinct footing from the nonresidents whom it may be difficult to reach. Furthermore, there is no discrimination among property owners in taxing for the improvement. When the assessment is made it operates upon all alike."

(c) New Assessment After Previous Assessment Declared Illegal.—The Constitution of the United States is not violated where a special municipal assessment has been declared illegal, and subsequent authority authorizes a new assessment for completing the work. The Supreme Court of Illinois decided a local and federal question when it held that it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment which had been set aside was made. The theory lying at the foundation of all arguments advanced to show that the court below committed error of a federal nature is this, and nothing more, that the equal protection of the laws was denied by the Supreme Court of Illinois, because that court, although it treated the assessing ordinance as invalid for the purposes of the first assessment, upheld that ordinance as valid for the second assessment. This but asserts that because it is considered that there was inconsistency in the reasoning by which the Supreme Court of Illinois sustained its conclusion, therefore the equal protection of the laws was denied. If the proposition as thus understood was held to be sound, as it cannot be, every case decided

in the courts of last resort of the several states would be subject to the revisory power of the United States Supreme Court, wherever the losing party deemed that the reasoning by which the state court had been led to decide adversely to his rights was inconsistent with the reasoning previously announced by the same court in former cases.

Lombard v. West Chicago Park Com'rs, (1901) 181 U. S. 33, *affirming* (1899) 181 Ill. 136.

(11) *Railroad Companies* — (a) *Taxing Stock When Incorporated in Other States*. — A state statute taxing stock in railroads incorporated in other states is not unconstitutional because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that state.

Kidd v. Alabama, (1903) 188 U. S. 731.

(b) *Apportionment of Taxation of Transitory Property Among Counties*. — A state statute providing a system of taxation of railroad property, which apportions the transitory and unlocated property of the railroad company among the several counties through which the road extends, instead of having such property taxed in the county where the railroad has its principal office, does not deny to it the equal protection of the law.

Columbus Southern R. Co. v. Wright, (1894) 151 U. S. 482, *affirming* (1892) 89 Ga. 574.

(c) *Deduction of Amount of Mortgages*. — The constitutional provision which authorizes the assessment and taxation of railroad property, and the property of other quasi-public corporations without deducting the amount of incumbrances, is not unconstitutional.

Central Pac. R. Co. v. State Board of Equalization, (1882) 60 Cal. 35.

(d) *Imposition of Special Mileage Tax on Street Railway*. — A city with statutory authority to grant or refuse a franchise to a street-railway company as "it shall deem for the best interest of the public" does not deny the equal protection of the laws to a particular street railway on which it imposes a special mileage tax, there being no general statute fixing a uniform mileage tax on all railways in the city.

Chicago Gen. R. Co. v. Chicago, (1898) 176 Ill. 253.

(12) *Express Companies* — (a) *Of Receipts*. — A statute which imposes a tax on the receipts of express companies, which are defined by the statute to be such as carry on the business of transportation on contracts for hire with railroad or steamboat companies, does not discriminate against such companies because it permits any person or company that owns its own means of transportation to go free from any such tax.

Pacific Express Co. v. Seibert, (1892) 142 U. S. 353, wherein the court said: "Diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of

those terms; and a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens," *affirming* (1890) 44 Fed. Rep. 310.

(b) *According to Unit Rule.*—The classification of express companies with railroad and telegraph companies, as subject to the unit rule in the assessment of their property for state taxation, does not deny the equal protection of the law.

Adams Express Co. v. Ohio State Auditor, (1897) 165 U. S. 228, *affirming* *Sanford v. Poe*, (C. C. A. 1895) 69 Fed. Rep. 546; *Western Union Tel. Co. v. Poe*, (1894) 64 Fed. Rep. 9.

(13) *Of Receipts of Foreign Building and Loan Association.*—A statute requiring every foreign building and loan association doing business within the state to pay into the treasury annually two dollars on every one hundred dollars of its annual gross receipts, does not violate this clause, as the statute imposes the same burden on all corporations similarly situated.

Southern Bldg., etc., Assoc. v. Norman, (1895) 98 Ky. 297.

(14) *Of Franchises*—(a) *Of Bank.*—The constitutional provision is not violated by assessing the corporate franchises of a banking corporation.

State Bank v. San Francisco, (1904) 142 Cal. 276.

Franchise tax on savings banks.—A statute of *New York* which provided that "every savings bank incorporated, organized, or formed under, by, or pursuant to a law of this state, shall pay to the state annually, for the privilege of exercising its corporate franchise

or carrying on its business in such corporate or organized capacity, an annual tax which shall be equal to one per centum of the par value of its surplus and undivided earnings," was held not to be illegally discriminating and not to conflict with the constitutional provision. *People v. Miller*, (1903) 84 N. Y. App. Div. 168, *modified* (1904) 177 N. Y. 461.

(b) *As Part of Capital Stock.*—A state revenue Act, which provides that the capital stock of corporations shall be so valued by the state board as to ascertain and determine the fair cash value of such capital stock, including the franchise, over and above the assessed value of its tangible property, and that the board shall, in the performance of that duty, adopt such rules and principles for ascertaining the fair cash value of such capital stock as to it may seem equitable and just, does not itself deny the equal protection of the laws, and the courts must assume that the board, possessing *quasi-judicial* powers, will exercise its functions as contemplated by the law.

Chicago Union Traction Co. v. State Board of Equalization, (1901) 112 Fed. Rep. 607, wherein the court said: "If it transpires that the board of equalization, through pique, or under the lash and spur of some external power, or through personal fear, or moved by any other consideration than the impartial and independent discharge of its own duty, attempts to certify an assessed valuation that in its effect would be a fraud upon any taxpayer, the courts still remain open to the injured taxpayer."

Franchise tax valued as other tangible property.—"If it be a fact that the fran-

chise of a *Kentucky* corporation is taxed at a different rate from the tangible property in the state, there can be no question that the state had power to tax it at a different rate, so far as the Constitution of the United States is concerned. *Bell's Gap R. Co. v. Pennsylvania*, (1890) 134 U. S. 232; *Merchants', etc., Bank v. Pennsylvania*, (1897) 167 U. S. 461, 464; *Magoun v. Illinois Trust, etc., Bank*, (1898) 170 U. S. 283, 295. It is doubtful, at least, if any further question should have been asked in this case. *Missouri v. Dockery*, (1903) 191 U. S. 165." *Coulter v. Louisville, etc., R. Co.*, (1905) 196 U. S. 608.

(15) *Of Real Estate of Bank in Addition to Shares of Stock.*—The taxation by a state of the real estate of a national bank in addition to that placed upon the shares of the stockholders, is not unequal taxation in the sense contemplated by the Constitution.

People's Nat. Bank v. Marye, (1901) 107 Fed. Rep. 579.

(16) *Of Property of Domestic Corporations Situated Outside State.* — A statute providing that "all real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair, voluntary sale," was held not to be unconstitutional even if the property is subject to taxation in another state. The fact that all the cars of the domestic corporation are taxed, whether in the state or not, while in assessing the property of railroads the cars in use out of the state are omitted, does not work an invalid discrimination. .

Com. v. Union Refrigerator Transit Co., (Ky. 1904) 80 S. W. Rep. 491.

(17) *Of Railroad Bonds on Property Outside the State.* — A provision of a state constitution and statute which subjects to taxation railroad bonds held in the state, but secured by property out of the state, is constitutional.

Mackey v. San Francisco, (1896) 113 Cal. 392.

(18) *Of Wages of Aliens.* — A statute providing "that all persons, firms, associations, or corporations employing one or more foreign-born unnaturalized male persons over twenty-one years of age within this commonwealth, shall be and are hereby taxed at the rate of three cents per day for each day each of such foreign-born unnaturalized male persons may be employed, which tax shall be paid into the respective county treasuries; one-half of which tax to be distributed among the respective school districts of each county, in proportion to the number of schools in said districts; the other half of said tax shall be used by the proper county authorities for defraying the general expenses of county government," imposes the tax upon the employee and not upon the employer, and deprives such alien of the equal protection of the laws. It imposes upon these persons burdens which are not laid upon others in the same calling and condition.

Fraser v. McConway, etc., Co., (1897) 82 Fed. Rep. 258. See also *Juniata Limestone Co. v. Fagley*, (1898) 187 Pa. St. 193, *affirming* (1898) 7 Pa. Dist. 201.

(19) *Succession Taxes.* — A state statute imposing a transfer tax is not a deprivation of the equal protection of the law when there are involved no arbitrary or unequal regulations, prescribing different rates of taxation on property or persons in the same condition; the provisions of the law extend alike to all estates that descend or devolve upon the death of those who once owned them; the moneys raised by the taxation are applied to the lawful uses of the state, in which the legatees have the same interests with the other citizens, and the amount or rate of the taxation is not excessive to the extent of confiscation.

Orr v. Gilman, (1902) 183 U. S. 287.

Classification of lineals and collaterals. — A state inheritance tax statute, as interpreted

and enforced by the state courts, taxing life estates where the remainder is to lineals, but not taxing and expressly exempting similar life estates where the remainder is to col-

laterals or to strangers in blood, is not unconstitutional as an arbitrary and unreasonable classification of life tenants, and as denying to such persons the equal protection of the laws. *Billings v. Illinois*, (1903) 188 U. S. 101, *affirming* (1901) 189 Ill. 472.

A state statute imposing a tax of five per centum upon the value of the property passing to any person not within certain degrees of consanguinity to the decedent by will or the intestate laws of the state, from any person who may die seized or possessed of the same while being a resident of the state, or which is within the state at the time of his death, is valid, as the law operates alike on all property and persons similarly situated. *Wallace v. Myers*, (1889) 38 Fed. Rep. 184.

Classification of relationship and strangers to the blood. — A state inheritance tax qualification does not deny the equal protection of the laws when the first and second classes are based, respectively, on the lineal

and collateral relationship to the testator or intestate, and the third is composed of strangers to the blood and distant relatives, and when the latter is again divided into sub-classes dependent upon the amount received. *Magoun v. Illinois Trust, etc., Bank*, (1898) 170 U. S. 296.

Classification according to total value of estates. — In order for a classification to be valid there must be uniformity among the particular class. The statute of *Wisconsin* of 1899 which authorized, where a whole estate was of ten thousand dollars or over in value, an inheritance tax, but the tax was not authorized where the amount was less than ten thousand dollars, the beneficiaries being of the same class, and the levy and assessment of the tax was without regard to the amount received by the beneficiary, was held to create an arbitrary unconstitutional discrimination between beneficiaries of the class, and was therefore invalid. *Black v. State*, (1902) 113 Wis. 205.

(20) *Deduction of Debts from Credits.* — A provision of a state constitution that a deduction of debts from credits may be authorized, does not conflict with this clause.

Newport v. Mudgett, (1897) 18 Wash. 276.

(21) *Mortgage Reduction from Valuation.* — A statute providing that any person being the owner of real estate liable for taxation within the state of Indiana and being indebted in any sum, secured by mortgage upon real estate, may have the amount of such mortgage indebtedness, not exceeding seven hundred dollars, existing and unpaid upon the first day of April in any year, deducted from the assessed valuation of the mortgaged premises for that year, and the amount of such valuation remaining after such deduction shall have been made shall form the basis for assessment and taxation for said real estate for said year, provided that no deduction shall be allowed greater than one-half of such assessed valuation of said real estate, was held to be constitutional.

State v. Smith, (1902) 158 Ind. 544.

(22) *Of Interest of Mortgagee.* — A statute which provides for the taxation as real estate of a mortgage interest in the land, does not deny to a non-resident mortgagee the equal protection of the laws. The statute expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage, and with equal distinctness provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, this interest, like any other interest legal or equitable, may be taxed to its owner, whether resident or nonresident, in the state where the land is situated, without contravening any provision of the Constitution of the United States.

Savings, etc., Soc. v. Multnomah County, (1898) 169 U. S. 432, *affirming* (1894) 60 Fed. Rep. 31.

Excepting quasi-public corporations. — The *California* constitution declares that "a mortgage, deed of trust, contract, or other obliga-

tion by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby," and that, "except as to railroad and other quasi-public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof," and also that "the taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof." These provisions require that each owner shall pay the tax on his separate interest, and if he pay the tax chargeable on the interest of the other he shall be allowed for

it, either by an addition to the mortgage debt, or a discharge of a portion of that debt according as he is the one or the other party to the security, but if a railroad corporation should execute its mortgage to secure a loan, the railroad company would have to pay the tax on the interest transferred, and would not be allowed any credit on the amount transferred. Such provisions deny the railroad companies the equal protection of the laws. *Santa Clara County v. Southern Pac. R. Co.*, (1883) 18 Fed. Rep. 390, *affirmed* on other grounds, (1886) 118 U. S. 394. See also *Railroad Tax Cases*, (1882) 13 Fed. Rep. 722.

A *Missouri* constitutional provision which declared that "a mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad property and the property of other quasi-public corporations, for which provision has already been made by law," was held to be unconstitutional. *Russell v. Croy*, (1901) 164 Mo. 69.

(23) *Of Debts Due from Solvent Debtors.* — A statute which subjects to taxation "debts due from solvent debtors" is constitutional.

Kingsley v. Merrill, (1904) 122 Wis. 185.

(24) *Occupation Taxes* — (a) *In General.* — A specific tax levied under a state statute upon persons engaged in the conduct of a particular business is not obnoxious to the Fourteenth Amendment to the Federal Constitution as denying to any person the equal protection of the laws where all persons of a given class designated and described by the special occupation in which they engage, are subject to the same specific tax, and the individual complaining falls within the class upon which such tax is imposed.

Singer Mfg. Co. v. Wright, (1895) 97 Ga. 114.

Professional licenses. — An ordinance of a city which provided that "there shall be levied and collected by the city treasurer and collector from all persons engaged in the kinds of business hereinafter mentioned within the limits of the city of Bozeman a license tax as follows: * * * 3. From each professional man, before practicing as such. All lawyers, dentists, physicians, surgeons, and all other professions, insurance agents, real estate agents, and notaries public, shall pay a license of one dollar (\$1) per quarter. Provided that all persons who draw any legal instruments, deeds, power of attorney or other documents, for which he charges a fee, when the amount of fees for such services amount to thirty dollars (\$30) per year, shall be considered a professional man. 4. Any person or persons, corporation or association who shall transact any business, trade, occupation, or profession, for which a license is required by this ordinance, without first obtaining the same, shall be guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not less than ten dollars (\$10) nor more than one hun-

dred dollars (\$100), together with costs of prosecution," was held to be constitutional. *Bozeman v. Cadwell*, (1894) 14 Mont. 482, 483.

Arbitrary discriminations. — The constitutional provisions were held to be violated by the second proviso of an Act of Congress for the District of Columbia, providing: General brokers shall pay a tax of two hundred and fifty dollars per annum. Every person, firm, company, or association not incorporated (except insurance and real estate brokers acting as such) that solicits business from the general public by advertisement or otherwise, and that purchases, sells, or negotiates for others securities, shares, stocks, bonds, exchange, bullion, coin, money, bank notes, or promissory notes, or that deals in futures on market quotations of prices or values on merchandise, shares, stocks, bonds, or other securities, or accepts margins or prices or values of said shares, stocks, bonds, merchandise, or securities, shall be deemed a general broker: Provided, that the Washington Stock Exchange, through its president or treasurer, shall pay to the collector of taxes of the District of Columbia a sum equal to five hundred dollars per annum in lieu of tax on the mem-

bers thereof for business done on said exchange; provided, further, that any broker who is a member of a regularly organized stock exchange located outside of the District of Columbia, and transacting a broker-

age business therein, shall pay a sum equal to one hundred dollars per annum to the collector of taxes of the District of Columbia. *Lappin v. District of Columbia*, (1903) 22 App. Cas. (D. C.) 69.

(b) **Discriminating Against Foreign Corporation.**— A statute adopted in accordance with the mandate of the state constitution which ordains that corporations domiciled without the state, carrying on business within the state, may be licensed differently from home corporations, does not violate this clause.

State v. Hammond Packing Co., (1903) 110 La. 180.

(c) **Bankers.**— The constitutional provision is not violated by a statute which authorizes the levy of an occupation tax against every person, firm, or association engaged in banking.

Brooks v. State, (Tex. Civ. App. 1900) 58 S. W. Rep. 1032.

(d) **Merchants — aa. MAXIMUM AND MINIMUM AMOUNT OF SALES.**— A municipal ordinance which imposes license taxes in such a manner that persons in the same occupation are classified by maximum and minimum amount of sales, does not deny the equal protection of the law.

Clark v. Titusville, (1902) 184 U. S. 330.

bb. **DISCRIMINATION BETWEEN RETAILERS AND WHOLESALERS.**— A statute imposing a tax upon every person dealing in cigarettes, but providing that "the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside of the state," is not invalid as denying to the dealers subject to the tax the equal protection of the laws.

Cook v. Marshall County, (1905) 196 U. S. 273.

The classification of wholesale and retail merchants for the purpose of a municipal license tax by an ordinance of a city of the third class in *Pennsylvania* was held not to violate the Federal Constitution. *Com. v. Clark*, (1900) 195 Pa. St. 634, *affirming* (1899) 10 Pa. Super. Ct. 507.

A statute taxing retailers at a higher rate than wholesalers does not violate this clause. *Knisely v. Cotterel*, (1900) 196 Pa. St. 614.

Discrimination in favor of wholesale liquor dealers.— An *Indiana* liquor license statute is not invalid for providing that none of the provisions of the "Act shall apply to any person engaged in business as a wholesale dealer, who does not sell in less quantities than five (5) gallons at a time" and thereby discriminating in favor of wholesale dealers, who are permitted to make sales without a license, while a retail dealer is not permitted to make a like sale without a license. *Daniels v. State*, (1897) 150 Ind. 362.

cc. **EXCEPTION OF PURCHASES OF FARM PRODUCTS FROM PRODUCER.**— A statute which provides that "every merchant, jeweler, grocer, druggist, or other dealer, who shall buy and sell goods, wares, and merchandise of whatever name or description, not specially taxed elsewhere in this Act, shall, in addition to his *ad valorem* tax upon his stock, pay as a license tax one-tenth of one per centum on the total amount of his purchases in or out of the state (except purchases of farm products from the producer) for cash or credit, whether such persons herein mentioned shall purchase as principal or through an agent or commission merchant," was held to be constitutional.

State v. French, (1891) 109 N. Car. 722. See also *State v. Stevenson*, (1891) 109 N. Car. 730.

dd. TRANSIENT MERCHANT. — A statute prohibiting the transaction of business by any transient merchant without license does not deny to him the equal protection of the laws.

Levy v. State, (1903) 161 Ind. 253.

A Rhode Island statute which provides that "every itinerant vender who shall sell or expose for sale, at public auction or private sale, any goods, wares, and merchandise without state and local licenses therefor, issued as hereinafter provided, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than one hundred nor more than two hundred and fifty dollars, and by imprisonment not less than ten nor more than thirty days" and that "the words 'itinerant vender,' for the purposes of this chapter, shall be construed to mean and include all persons, both principals and agents, who engage in a temporary or transient business in

the state, either in one locality or in traveling from place to place selling goods, wares, and merchandise, and who, for the purposes of carrying on such business, hire, lease, or occupy any building or structure for the exhibition and sale of such goods, wares, and merchandise," does not deny to such merchants the equal protection of the laws. Laws which are public in their objects, in the absence of any express constitutional prohibition, may extend to all citizens or be confined to particular classes; and if otherwise unobjectionable, all that can be required is that they be general in their application to the class to which they apply. *State v. Foster*, (1900) 22 R. I. 165.

(e) **Peddlers.** — This constitutional provision was not so self-executing as to repeal *proprio vigore* state laws in existence at the time of the adoption of the clause, and a statute which provided that no person or persons shall buy, or barter for, within the limits of certain counties, as a hawker or peddler, any butter, eggs, dried fruit, veal, or other article of produce, with intent to send the same for sale or barter to any other market out of the said counties, without first obtaining a license to do so, and paying therefor, was not repealed or affected by the constitutional provision.

Rothermel v. Meyerle, (1890) 136 Pa. St. 250.

Excepting general merchants. — An Arkansas statute providing that "before any person either as owner, manufacturer, or agent, shall travel over or through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage, and vehicles, or either of said articles, he shall procure a license from the county clerk of such county, authorizing such person to conduct such business; provided, nothing in this Act shall apply to any resident merchant in said county," was held to be unconstitutional. *Ex p. Deeds*, (Ark. 1905) 87 S. W. Rep. 1030.

Excepting honorably discharged soldiers. — The statutory provisions of Vermont, enacting that a person who becomes a peddler without a license in force, as provided, shall be fined not more than three hundred dollars and not less than fifty dollars; also that persons resident in the state who served as soldiers of the Union for suppression of the rebellion in the southern states, and who were honorably discharged, are exempt from payment of the license tax under a provision of the law, were held to discriminate unjustly

in favor of soldiers and against other persons, by reason of which the constitutional amendment was violated. *State v. Shedroi*, (1903) 75 Vt. 277, the court saying: "We think it clear that the discrimination made in the law in question, in favor of persons who served in the war of the rebellion, and were honorably discharged, is without reasonable ground and arbitrary, having no possible connection with the duties of the citizens as taxpayers, and their exemption from the payment of the tax therein required of others exercising the same calling is pure favoritism and a denial of the equal protection of the laws."

Discriminating as to amount of tax on stock in trade. — The constitutional provision is violated by the provisions of the Act of Maine of 1901, ch. 277, in reference to hawkers and peddlers, in that the discrimination between those who own and pay taxes on a stock in trade to the amount of twenty-five dollars, and those who pay a less tax on their stock in trade, exempting the former from paying license taxes while requiring the latter to pay them, constitutes an illegal arbitrary discrimination. *State v. Mitchell*, (1902) 97 Me. 66.

(f) **Agents of Foreign Insurance Company.** — A statute providing that there shall be paid "by every person who shall act in the city and county of New York as agent for or on behalf of any individual, or association of individuals, not incorporated by the laws of this state, to effect insurances against losses

or injury by fire in the city and county of New York, although such individuals or association may be incorporated for that purpose by any other state or country, the sum of two dollars upon the hundred dollars," is valid as the tax is uniform and equal in its application, and is imposed upon all persons who, to effect insurance, act as agents for any individual, or association of individuals, not incorporated by the laws of the state.

Fire Dept. v. Stanton, (1898) 28 N. Y. App. Div. 335. See also *Fire Dept. v. Noble*, (1854) 3 E. D. Smith (N. Y.) 440; *Fire Dept. v. Wright*, (1854) 3 E. D. Smith (N. Y.) 453.

(g) **Packing-house Agents.**—A municipal ordinance imposing a tax upon all agents of packing houses doing business in the state in each county where the business is carried on is not invalid as denying to the managing agent of a foreign packing house the equal protection of the laws, as the tax is imposed alike upon the managing agents both of domestic and foreign houses.

Kehrer v. Stewart, (1905) 197 U. S. 69, affirming (1902) 115 Ga. 184.

A North Carolina statute imposing a license tax "upon every meat packing house

doing business in this state, one hundred dollars for each county in which said business is carried on," is valid. *Lacy v. Armour Packing Co.*, (1904) 134 N. Car. 567.

(h) **On Business of Selling Sewing Machines.**—A statute imposing a tax on the business of selling or dealing in sewing machines does not deny to sewing-machine companies the equal protection of the laws.

Singer Mfg. Co. v. Wright, (1887) 33 Fed. Rep. 121. See also *Weaver v. State*, (1892) 89 Ga. 642.

On sewing-machine agents.—An ordinance imposing a license tax of twenty-five dollars on any one acting as agent, solicitor, or canvasser of sewing machines, was held not to be repugnant to the constitutional provision. *St. Louis v. Bowler*, (1887) 94 Mo. 630, the court saying: "No one is denied the equal protection of the laws upon whose occupation or upon whose property no greater burden is imposed than is imposed upon the same occupation or the same kind of property by the authority levying the tax."

Exempting general merchants.—An Alabama statute which provided that "it shall be unlawful for any person, firm, company,

or corporation, to engage in or carry on any business for which a license is by law required, without having paid for and taken out a license therefor" and that "each sewing-machine * * * company, selling sewing machines * * * either themselves or by their agents, and all persons who engage in the business of selling sewing machines, shall pay to the state twenty-five dollars for each county in which they may so sell," was held not to discriminate unconstitutionally between companies which sell sewing machines and persons or individuals who engage in the business of selling sewing machines. It was also held that an exemption of merchants engaged in a general business, keeping sewing machines as a part of their stock, did not discriminate unconstitutionally. *Quartlebaum v. State*, (1885) 79 Ala. 1.

(i) **Emigrant Agents.**—A state law taxing the business of hiring persons to labor outside the state limits does not deny to persons engaged in such business the equal protection of the laws when the business of hiring persons to labor within the state is not subjected to like tax.

Williams v. Fears, (1900) 179 U. S. 274, affirming (1900) 110 Ga. 584. See also *Sheppard v. Sumter County*, (1877) 59 Ga. 535.

A South Carolina statute entitled "An Act to prohibit emigrant agents from plying their vocation within this state without first obtaining a license therefor, and for other purposes," is not discriminatory in any unlawful sense by requiring a license for such

business when the labor is to be performed out of the state and not requiring a license when the labor is to be performed within the state. "The business which seeks to induce laborers to leave the state and the business which promotes the employment of laborers within the state, are so different in their tendencies for good or evil to general interest, as to justify a different classification and treatment with respect to them." *State v. Napier*, (1901) 63 S. Car. 67.

(j) Laundry License.

A statute providing that "every male person engaged in the laundry other than the steam laundry business must pay a license of ten dollars per quarter, provided that, where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of twenty-five dollars per quarter, which shall be the license for one place of business only," when another statute provides that "every person who carries on a steam laundry must pay a license

of fifteen dollars per quarter," casts a greater burden upon those conducting the business of a laundry otherwise than by steam, where one or more persons are employed, than is imposed upon those conducting a steam laundry, without presenting conditions which would justify the state in adding this additional burden. *In re Yot Sang*, (1890) 75 Fed. Rep. 983. But in *State v. French*, (1895) 17 Mont. 54, the statute was held to be valid.

(k) Discretion in Issuing Licenses. — A municipal ordinance vesting power in the mayor to grant or refuse a license to sell cigarettes does not deny the equal protection of the laws because in other kinds of business where licenses are granted to persons engaged in any trade or occupation there is not given to the mayor a like exercise of discretion.

Gundling v. Chicago, (1900) 177 U. S. 186.

A statute relating to deposits of phosphate rock in state property provided "that in every case in which applications shall be made to the board of agriculture for a license to dig, mine, and remove phosphate rock and phosphatic deposits from the beds of the

navigable streams or from the marshes of this state, it shall be within the power and authority of the said board to grant or refuse the said license, as the said board may, in its discretion, deem best for the interests of the state and the proper management of the interests of the state in such deposits." *State v. Hagood*, (1888) 30 S. Car. 519.

AMENDMENT XIV., SECTION 2.

“Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.”

Clause of Original Constitution Abrogated. — Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons.

Elk v. Wilkins, (1884) 112 U. S. 102.

A Seceded State Is Not Entitled, on its Readmission into the Union, to immediate representation of the two-fifths of its colored population added to its basis of population by the Fourteenth Article of Amendment to the Federal Constitution, without awaiting the next census.

Segar, 2 Bart. 810.

State Control of Suffrage. — This section distinctly recognizes the right of a state to deny or abridge the right to vote of the male inhabitants who are twenty-one years of age, and it is well known that many of the states have from time to time, by an impartial and uniform rule of prohibition, denied the right to vote to such of their male inhabitants as were thought not to possess the qualifications necessary for an independent and intelligent exercise of the right.

Stone v. Smith, (1893) 159 Mass. 414.

Not only does this section assume that the right of male inhabitants to vote was the special object of its protection, but it assumes and admits the right of a state to deny

to classes or portions of the male inhabitants the right to vote which is allowed to other male inhabitants. The regulation of the suffrage is thereby conceded to the states as a state's right. *U. S. v. Anthony*, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

Subject to Penalty of Reduction in Representation. — “The first section of the Fourteenth Amendment does not refer to the exercise of the elective franchise, though the second provides that if the right to vote is denied or abridged to any male inhabitant of the state having attained majority, and being a citizen of the United States, then the basis of representation to which each state is entitled in the Congress shall be proportionately reduced. Whenever presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged without invoking the penalty, and so of

the right to vote for representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof. The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. There is no color for the contention that under the amendments every male inhabitant of the state being a citizen of the United States has from the time of his majority a right to vote for presidential electors."

McPherson v. Blacker, (1892) 146 U. S. 39, *affirming* (1892) 92 Mich. 377.

"Excluding Indians Not Taxed." — In holding that Indians maintaining tribal relation are the wards of the nation and owe no allegiance to the states, and receive from them no protection, the Supreme Court of the United States said: "In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, *excluding Indians not taxed*, which, of course, excluded nearly all of that race, but which meant that if there were such within a state as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, excluding Indians not taxed, is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes, distinct from the ordinary citizens of a state or territory."

U. S. v. Kagama, (1886) 118 U. S. 378.

Indians Not Taxed Are Not Citizens. — Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.

Elk v. Wilkins, (1884) 112 U. S. 102.

AMENDMENT XIV., SECTION 3.

"No person shall be a senator or representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability."

State Officers.—*Sheriffs, County Solicitors, and Other Officers* required to take an oath to support the Constitution of the United States by the laws of the state are within the operation of this clause.

Worthy v. Barrett, (1869) 63 N. Car. 199.

A *Constable* who took the oath to support the Constitution of the United States, required of such an office, and subsequently engaged in the civil war, was an officer of the state within the meaning of this amendment.

U. S. v. Powell, (1871) 65 N. Car. 709, 27 Fed. Cas. No. 16,079.

Engaged in Rebellion.—*One Who Is, or Has Been, Disloyal* to the government is disqualified to hold a seat as representative in Congress.

Smith v. Brown, 2 Bart. 395; *McKee v. Young*, 2 Bart. 422; *Christy*, 2 Bart. 464; *Wallace v. Simpson*, 2 Bart. 731.

The Word "Engage" Implies a Voluntary Effort to assist the insurrection or rebellion, and to bring it to a successful termination. When a person furnished a substitute for himself to the Confederate army, but alleges that he himself was enrolled, and was about to be conscripted, and was overcome by force, which he could not resist, his action must have been prompted by a well-grounded fear of great bodily harm and the result of force, which he was able neither to escape nor resist, and his action must have sprung from want of sympathy with the insurrectionary movement, and not from his repugnance to being in the army merely.

U. S. v. Powell, (1871) 65 N. Car. 709, 27 Fed. Cas. No. 16,079.

"Aid and Comfort may be given to an enemy by words of encouragement, or the expression of an opinion, from one occupying an influential position;" or by "being active in feeding rebels" engaged in war against the government.

McKee v. Young, 2 Bart. 422.

Holding Office under Confederate Government—*With Purpose to Render Assistance to United States.*—The holding of an office under a seceded state government,

where the prime purpose was to render assistance to the United States government and its loyal citizens, while a violation of the letter was not inimical to the spirit of the Fourteenth Amendment to the Constitution, and did not disqualify one from holding the office of representative.

Tucker v. Booker, 2 Bart. 772. See also *Patterson*, Taft 271.

Holding a Commission of Justice of the Peace under the Confederate government did not necessarily involve giving adherence or countenance to the rebellion.

U. S. v. Powell, (1871) 65 N. Car. 709. 27 Fed. Cas. No. 16,079, wherein the court said: "It was absolutely necessary that during that commotion there should have been some to preserve order and to restrain the vicious and licentious, who, without this, would have taken advantage of the turmoil to pillage and

destroy friend and foe alike. He was a mere peace officer, and unless it be shown that under his commission the defendant did some act in aid of the insurrection or rebellion, the fact that he was justice of the peace is of no consequence in the determination of his guilt or innocence under this indictment."

A Clerk of a District Court, holding the office during the Civil War, did not engage in insurrection or rebellion against the United States government, or give aid or comfort to the enemies thereof, if he confined himself to his legitimate duties as clerk.

Hudspeth v. Garrigues, (1869) 21 La. Ann. 684, wherein the court said: "If, in legislative, or other official capacity, he had been engaged in the furtherance of the unlawful purposes of the insurgents, when the duties of his office necessarily had relation to the support of the rebellion; if he had

held a position created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause; or if he had in some way misused the office he did hold to forward the designs of the enemies of the United States; the case would have been very different."

Involuntary Service in the Confederate Army does not render the person rendering such service ineligible to hold the office of sheriff.

Privett v. Stevens, (1881) 25 Kan. 275.

Removal of Disability — Effect of Pardon. — This section does not operate to exclude a person from holding office under the United States who received a full pardon from the President for the part he had taken in the Civil War prior to the adoption of the amendment.

Pardon — Lawton's Case, (1885) 18 Op. Atty-Gen. 149.

By Resolution of House of Representatives.

A person who had accepted office under a Confederate state, thereby becoming disqualified from holding the office of representative

in Congress, could be relieved of such disqualification by resolution of the House of Representatives. *Butler*, 2 Bart. 461.

The Act of Congress of June 6, 1898, ch. 389, 30 Stat. L. 432, provides "that the disability imposed by section 3 of the Fourteenth Amendment to the Constitution of the United States heretofore incurred is hereby removed."

See 6 FED. STAT. ANNOT. 583.

Retrospective Operation. — Persons in office before the promulgation of this amendment were not removed therefrom by the direct and immediate effect of the prohibition to hold office contained in this section, but legislation by Congress was necessary to give effect to the prohibition by providing for such removal, and it results further that the exercise of their several functions by

these officers, until removed in pursuance of such legislation, was not unlawful. The intention was to create a disability to remove any proper case by a two-thirds vote, and to be made operative in other cases by the legislation of Congress in its ordinary course. This construction gave certain effect to the undoubted intent of the amendment to insure the exclusion from office of the designated class of persons if not relieved from their disability, and avoided the manifold evils which must have attended the construction that this prohibition incidentally, on the day of its promulgation, affected all offices held by persons within the category of prohibition, and made all official acts performed by them since that day null and void.

Griffin's Case, (1869) Chase (U. S.) 364, 11 Fed. Cas. No. 5,815. See *State v. Watkins*, (1869) 21 La. Ann. 633.

Payment of Claim Prohibited by Joint Resolution. — Where the payment of a claim against the government would otherwise come within the prohibition of a joint resolution, the fact that the political disabilities of the claimant imposed by this section have since been removed by Congress does not free the claim from the operation of that resolution; the prohibition of payment still continues.

Williams's Case, (1873) 14 Op. Atty.-Gen. 329.

AMENDMENT XIV., SECTION 4.

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."

A Contract for the Purchase of Confederate Coupon Bonds and the undertaking to deliver them cannot be enforced, nor will a court entertain a suit to recover damages against a party for the failure to comply with the contract for such bonds or obligations.

Branch v. Haas, (1883) 16 Fed. Rep. 54, wherein the court said: "The plaintiff relies upon the authority of *Thorington v. Smith*, (1868) 8 Wall. (U. S.) 1. That was a case where property had been sold in 1864, while the war was flagrant. The property was real estate. A portion of the purchase money was paid in Confederate treasury notes, which was the currency, and substantially the only currency, in circulation at the time here, in Montgomery, Alabama, where the transaction took place and where all the parties resided at the time. A note was given for the unpaid portion of the purchase money, ten thousand dollars, and after the war ended and the Confederate States of America passed out of existence, suit was brought for the unpaid portion of the purchase money of the property, and the question was whether the note could be enforced. The transaction of sale of which it was a part was in Confederate treasury notes, and it was proposed to be shown that it was the understanding of the parties that the note also was to be paid in the same currency. The court held that such contracts could be enforced in the courts of the United States, after the restoration of peace, 'to the extent of their just obligation,' but the opinion of the court shows that this result was reached, not because of any recognition of Confederate treas-

ury notes as of any just and valid obligation, or that transactions based upon such currency should be upheld, except as to persons residing within Confederate lines, and where such currency was the only currency in which exchanges in the common transactions of life could be made; and in speaking of such currency the court said in that case: 'It must be regarded, therefore, as a currency imposed upon the community by irresistible force.' This case of *Thorington v. Smith* is commented on in the subsequent case of *Hanauer v. Woodruff*, (1872) 15 Wall. (U. S.) 439, cited above, which was a suit on a promissory note, dated at Memphis, Tennessee, December 22, 1861, the consideration of which was bonds issued by the authority of the convention of Arkansas which attempted to carry the state out of the Union, for the purpose of supporting the war levied by the insurrectionary bodies then controlling the state against the federal government. In that case the court held that the bonds did not constitute a valid consideration for the note sued on, even though bonds of that character were used as a circulating medium in Arkansas and about Memphis, Tennessee, in the business transactions of the people."

See *Contract for Payment of Confederate Notes*, *supra*, p. 237.

AMENDMENT XIV., SECTION 5.

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

I. LEGISLATION MUST BE DIRECTED AGAINST STATE ACTION, 631.

1. *In General*, 631.
2. *Except in Cases of Affirmative Grants of Power to Congress*, 632.
3. *Conspiracy to Deprive Any Person of the Equal Protection of the Laws*, 632.
4. *Prohibiting Denial of Admission to Privileges of Public Places*, 633.

II. POWER LIMITED TO ENFORCEMENT OF GUARANTY, 634.

III. JURORS NOT TO BE EXCLUDED ON ACCOUNT OF RACE, ETC., 634.

IV. REMOVAL OF CAUSES AGAINST PERSONS DENIED ANY CIVIL RIGHT, 635.

V. EMPOWERING OFFICER TO DETERMINE FACTS OF CITIZENSHIP, 635.

VI. NO POWER TO LEGISLATE ON LOCAL AFFAIRS, 635.

I. LEGISLATION MUST BE DIRECTED AGAINST STATE ACTION — 1. In General.

—The prohibitions of the Fourteenth Amendment are directed to the states, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the state have, by the Constitution of the United States, empowered Congress to enact.

Ex p. Virginia, (1879) 100 U. S. 346. See also *Ex p. Higgins*, (1904) 134 Fed. Rep. 404; *U. S. v. Patrick*, (1893) 54 Fed. Rep. 350; *U. S. v. Washington*, (1883) 20 Fed. Rep. 631; *Smoot v. Kentucky Cent. R. Co.*, (1882) 13 Fed. Rep. 343.

Until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may be, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures

and to supersede them. The legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking. *Civil Rights Cases*, (1883) 109 U. S. 13.

Conspiracy to prevent appearance as a witness.—The right of any person to be a witness, and to attend court for the purpose of giving his testimony, is not a right granted by the Constitution. The construction of a statute which would bring within its meaning a charge of conspiracy to oppress a citizen of the United States in the exercise of his right to appear and testify as a witness before the grand jury of a federal court, and also that of having, in pursuance of such conspiracy, murdered him because of his having exercised that right, would render it inconsistent with the Constitution. *U. S. v. Sanges*, (1891) 48 Fed. Rep. 86, wherein the court said that there is nothing to indicate that the provisions of these amendments "are to be enforced by congressional enactments

authorizing the trial, conviction, and punishment of individuals for individual invasions of individual rights, unless committed under state authority; this amendment guarantees immunity from state laws and state acts invading the privileges and rights specified in the amendment, but confers no rights upon one citizen as against another. The provision authorizing Congress to enforce its guarantees by legislation means such legislation as is necessary to control and counteract state abridgment. Writ of error dismissed, as such writ does not lie on behalf of the United States in criminal cases in the absence of statute, (1892) 144 U. S. 310. See secs. 1977 and 1978, R. S., 1 FED. STAT. ANNOT. 791.

"I am, therefore, of opinion that in so far as the Civil Rights Bill assumes to compel, regulate, or control the admission of evidence in the courts of this state, it is inoperative, unconstitutional, and void." *Per* Gilpin, C. J., in *The State v. Rash*, (1867) *Houst. Crim. Cas. (Del.)* 271.

The Civil Rights Bill of 1866 must prevail where its provisions come into conflict with state law; and, under its first section, negroes have equal rights with whites to give evidence, and are competent witnesses. *Ex p. Warren*, (1868) 31 Tex. 143; *Kelley v. State*, (1869) 25 Ark. 392.

2. Except in Cases of Affirmative Grants of Power to Congress. — The rule that in the enforcement of provisions guaranteeing civil rights, Congress is limited to the enactment of legislation corrective of any wrong committed by the states and not by the individuals, does not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied by an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state legislation or state action in reference to that subject, the power given is limited to its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

Civil Rights Cases, (1883) 109 U. S. 18.

Right or immunity guaranteed by the Constitution. — A right or an immunity, whether created by the Constitution or only guaran-

teed by it, even without an express delegation of power, may be protected by Congress. *Strauder v. West Virginia*, (1879) 100 U. S. 310, *reversing State v. Strauder*, (1877) 11 W. Va. 745.

3. Conspiracy to Deprive Any Person of the Equal Protection of the Laws. — Section 5519, R. S., providing that "if two or more persons in any state or territory conspire or go in disguise upon the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws, each of said persons shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment," is not warranted by any clause in this amendment. It is not limited to take effect only in case the state shall

abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws. It applies, no matter how well the state may have performed its duty. Under it private persons are liable to punishment for conspiring to deprive any one of the equal protection of the laws enacted by the state.

U. S. v. Harris, (1882) 106 U. S. 632, wherein the court said: "When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws;

when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress." See also *Baldwin v. Franks*, (1887) 120 U. S. 684; *Le Grand v. U. S.*, (1882) 12 Fed. Rep. 579.

4. Prohibiting Denial of Admission to Privileges to Public Places.—An Act of Congress which declares that in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of amusement, no distinction shall be made between citizens of different race or color, or between those who have and those who have not been slaves, is not within the power of Congress under this clause. The statute does not profess to be corrective of any constitutional wrong committed by the state, but steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules without referring in any manner to any supposed action of the state or its authorities.

Civil Rights Cases, (1883) 109 U. S. 10. See also *U. S. v. Washington*, (1883) 20 Fed. Rep. 631; *Charge to Grand Jury*, (1875) 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

An Act of Congress, so far as it seeks to inflict penalties for the violation of any or all rights which belong to the citizens of a state, and not to citizens of the United States, as such, is the exercise of a power not authorized by any provision of the Constitution of the United States, and the privilege to use for local travel any public conveyance is not a right arising under the Constitution of the United States. *Cully v. Baltimore, etc., R. Co.*, (1876) 1 Hughes (U. S.) 536, 6 Fed. Cas. No. 3,466.

There is no power of federal legislation to provide penalties for the violation of any privileges save the few which are enjoyed primarily under the Federal Constitution. The Act of Congress making it an offense to deny to colored people "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the theatres and inns" of a state is invalid. *Charge to Grand Jury*, (1875) 21 Int. Rev. Rec. 173, 30 Fed. Cas. No. 18,260.

The state laws of North Carolina fully protect all persons, irrespective of class, in equal rights to the use and accommodations of inns and public conveyances; and therefore the Civil Rights Act of March 1, 1875,

18 Stat. L. 114, p. 335, was not necessary in North Carolina, its only effect being to give to the federal courts the jurisdiction of wrongs suffered by citizens by reason of class. *Civil Rights Bill*, (1875) 1 Hughes (U. S.) 541.

Contrasted with Thirteenth Amendment.—"We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the states from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty, or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and

involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can

only be, corrective in its character, addressed to counteract and afford relief against state regulations or proceedings." *Civil Rights Cases*, (1883) 109 U. S. 23.

II. POWER LIMITED TO ENFORCEMENT OF GUARANTY.—This amendment does not add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of the citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

U. S. v. Cruikshank, (1875) 92 U. S. 555, affirming (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897.

"The recent amendments to the Constitution were intended to secure freedom and the benefits of citizenship to colored men, and protect their civil rights against hostile state legislation. All state laws which discrimi-

nate against colored men as a race, and deny them equal civil rights with other citizens, are now prohibited by the Constitution, and may be declared unconstitutional by the courts; and Congress may also enforce the civil rights thus denied, by suitable legislation." *Charge to Grand Jury*, (1875) 1 Hughes (U. S.) 541, 30 Fed. Cas. No. 18,258.

III. JURORS NOT TO BE EXCLUDED ON ACCOUNT OF RACE, ETC.—An Act of Congress which enacts that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars," is a constitutional exercise of the power of Congress under this provision.

Ex p. Virginia, (1879) 100 U. S. 344, wherein the court said: "All of the amendments derive much of their force from this latter provision. It is not said that the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a state in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against state denial or invasion, if not prohibited, is brought within the domain of congressional

power." See Act of March 1, 1875, ch. 114, sec. 4, 4 FED. STAT. ANNOT. 740. See also *Neal v. Delaware*, (1880) 103 U. S. 370.

The principle is reaffirmed that sections 1977 and 641, R. S., and the Act of March 1, 1875, 18 Stat. L. 114, sec. 4, "were constitutional exertions of the power of Congress to enact appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons; that while a state, consistently with the purposes for which the amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, * * * and therefore an accused, being of the colored race, cannot claim as matter of right that his race shall be represented on the jury, yet a denial to citizens of the African race, because of their

color, of the right or privilege accorded to white citizens, of participating as jurors in the administration of justice, would be a discrimination against the former inconsistent

with the amendment, and within the power of Congress, by appropriate legislation, to prevent." *Gibson v. Mississippi*, (1896) 162 U. S. 565.

IV. REMOVAL OF CAUSES AGAINST PERSONS DENIED ANY CIVIL RIGHT. —

Section 641, R. S., enacting that "when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied, or cannot enforce, in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, * * * such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending," was fully warranted by the fifth section of the Fourteenth Amendment.

Strauder v. West Virginia, (1879) 100 U. S. 311, *reversing State v. Strader*, (1877) 11 W. Va. 745. See 4 FED. STAT. ANNOT. 258.

Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted. *Virginia v. Rives*, (1879) 100 U. S. 318.

Primarily, as will be readily seen from the language, the effect of this first section of the

Fourteenth Amendment is to prohibit the states from making laws which discriminate against the negro race, but recently emancipated when the amendment was adopted; and it has been so construed in many decisions of the federal Supreme Court. In that view of it Congress has legislated upon the subject, and in that view alone, and provided that whenever it shall appear that any law of a state so discriminates, then it shall be ground for removal of any cause affected thereby from the state to the federal court. In such cases, the question is purely one of law — that is to say, it arises upon the proper construction of the state law — to determine whether or not the law does really so discriminate. All cases in which that phase of the amendment is the subject of discussion are applicable only incidentally, if at all, to the case at bar, which arises also from the Fourteenth Amendment, but not from any express language therein contained, but from the construction given to it by the courts. *Eastling v. State*, (1901) 69 Ark. 192.

V. EMPOWERING OFFICER TO DETERMINE FACTS OF CITIZENSHIP. — It is competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends.

Chin Bak Kan v. U. S., (1902) 186 U. S. 200.

VI. NO POWER TO LEGISLATE ON LOCAL AFFAIRS. — The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges or immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws, did not invest and did not attempt to invest Congress with power to legislate upon subjects which are within the domain of state legislation.

In re Rahrer, (1891) 140 U. S. 554.

Domestic relations. — This amendment gives no power to Congress to interfere with

the right of a state to regulate the domestic relations of its own citizens. *Ex p. Kinney*, (1879) 3 Hughes (U. S.) 9, 14 Fed. Cas. No. 7,825.

AMENDMENT XV., SECTION 1.

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."¹

- I. THIS SECTION IS SELF-EXECUTING, 636.
- II. PROHIBITION UPON STATE ACTION AND NOT THAT OF INDIVIDUALS, 636.
- III. RIGHT TO VOTE, 637.
 1. *Not Conferred by This Amendment*, 637.
 2. *Dependent upon State Law*, 637.
 - a. *In General*, 637.
 - b. *Requiring Educational Qualification*, 638.
 - c. *Right of Women to Vote*, 638.
 - d. *Right of Indians to Vote*, 638.
- IV. AMENDMENT GIVES RIGHT OF EXEMPTION FROM DISCRIMINATION, 638.
- V. COURT OF EQUITY WITHOUT JURISDICTION OVER ELECTION OFFICERS, 639.

I. THIS SECTION IS SELF-EXECUTING. — This first section of the amendment is self-executing, and of its own force renders void all legislation, state or national, which discriminates against citizens of the United States on account of their race, color, or previous condition of servitude.

U. S. v. Amsden, (1881) 6 Fed. Rep. 822.

II. PROHIBITION UPON STATE ACTION AND NOT THAT OF INDIVIDUALS. — This amendment relates solely to action "by the United States or by any state," and does not contemplate wrongful individual acts.

James v. Bowman, (1903) 190 U. S. 136.
See also U. S. v. Amsden, (1881) 6 Fed. Rep. 822.

State, and not individual, action is the subject of this article. "There is no more reason for assuming that this amendment authorizes legislation for the punishment of the ruffianly act of an individual in preventing the enjoyment of the right to vote in a state or municipal election, even though the intimidation be grounded upon race, color, or

previous condition of servitude, than there would be for legislation punishing a trespass upon property upon the ground that such a trespass would be a denial of due process of law. Both the Fourteenth and the Fifteenth Amendments are addressed to state action through some channel exercising the power of the state." *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. Rep. 255.

This amendment has reference solely to actions of the state, and not to any action of

¹ This amendment was proposed to the legislatures of the several states by the Fortieth Congress on Feb. 27, 1869, and was declared, in a proclamation of the secretary of state, dated March 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven states. The dates of these ratifications (arranged in the order of their reception at the department of state) were: From North Carolina, March 5, 1869; West Virginia, March 3, 1869; Massachusetts, March 9-12, 1869; Wisconsin, March 9, 1869; Maine, March 12, 1869; Louisiana, March 5, 1869; Michigan, March 8, 1869; South Carolina, March 16, 1869; Pennsylvania, March 26, 1869; Arkansas, March 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, March 5, 1869; Indiana, May 13-14, 1869; New York, March 17, April 14, 1869 (and the legislature of the same state passed a resolution Jan. 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, March 1, 1869; Vermont, Oct. 21, 1869; Virginia, Oct. 8, 1869; Missouri, Jan. 10, 1870; Mississippi, Jan. 15-17, 1870; Ohio, Jan. 27, 1870; Minnesota, Feb. 19, 1870; Rhode Island, Jan. 18, 1870; Nebraska, Feb. 17, 1870; Texas, Feb. 18, 1870. The state of Georgia also ratified the amendment Feb. 2, 1870.

private individuals, although it is immaterial whether the state acts by its legislative, executive, or judicial authority. *U. S. v. Morris*, (1903) 125 Fed. Rep. 323.

This amendment operates as an inhibition upon individuals, as well as upon the states,

in respect to the matters therein embraced. *U. S. v. Lackey*, (1900) 99 Fed. Rep. 962, following in this respect *U. S. v. Cruikshank*, (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897, affirmed (1875) 92 U. S. 542.

III. RIGHT TO VOTE — 1. Not Conferred by This Amendment. — This amendment does not confer the right of suffrage upon any one.

U. S. v. Reese, (1875) 92 U. S. 214. See also *Anthony v. Halderman*, (1871) 7 Kan. 62.

This is the only prohibition on the states contained in the Constitution which concerns the right to vote. *Stone v. Smith*, (1893) 159 Mass. 413.

This amendment does not confer the right of suffrage upon any one, nor does it secure or guarantee any right of suffrage to any class of citizens. It has no other force or effect than to forbid discrimination by the United States and by the states "on account of race, color, or previous condition of servitude." *Lackey v. U. S.*, (C. C. A. 1901) 107 Fed. Rep. 118. See also *U. S. v. Miller*, (1901) 107 Fed. Rep. 913.

The right of suffrage is not inherent in citizenship, nor is it a natural and inalienable right like the right to life, liberty, and the pursuit of happiness. Unless restrained by constitutional limitation, the legislature may lawfully confer the right of suffrage upon such portion of the citizens of the United States as it may deem expedient, and may deny that right to all others. Before the adoption of the Fifteenth Amendment, it was

within the power of the state to exclude citizens of the United States from voting on account of race, age, property, education, or any other ground however arbitrary or whimsical. The Constitution of the United States, before the adoption of the Fifteenth Amendment, in no wise interfered with this absolute power of the state to control the right of suffrage in accordance with its own views of expediency or propriety. It simply secured the right to vote for members of Congress to a definite class of voters of the state, consisting of those who are eligible to vote for members of the most numerous branch of the state legislature. Further than this, no power was given by the Constitution, before the adoption of the Fifteenth Amendment, to secure the right of suffrage to any one. The Fifteenth Amendment does not in direct terms confer the right of suffrage upon any one. It secures to the colored man the same right to vote as that possessed by the white man, by prohibiting any discrimination against him on account of race, color, or previous condition of servitude. Subject to that limitation, the states still possess uncontrollable authority to regulate the right of suffrage according to their own views of expediency. *U. S. v. Miller*, (1901) 107 Fed. Rep. 914.

2. Dependent upon State Law — a. IN GENERAL. — From this amendment it operates that the right of suffrage is not the necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, color, or previous condition of servitude is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

U. S. v. Cruikshank, (1875) 92 U. S. 555, affirming (1874) 1 Woods (U. S.) 308, 25 Fed. Cas. No. 14,897. See also *McPherson v. Blacker*, (1892) 146 U. S. 38.

The right of a citizen to vote depends upon the laws of the state in which he resides, and is not granted to him by the Constitution of the United States, nor is such right guaranteed to him by that instrument. All that is guaranteed to him is, that he shall not be deprived of the suffrage by reason of his race, color, or previous condition of servitude. *U. S. v. Crosby*, (1871) 1 Hughes (U. S.) 448, 25 Fed. Cas. No. 14,893.

This amendment is "a limitation upon the powers of the states in the execution of their

otherwise unlimited right to prescribe the qualification of voters in their own elections, and the power of Congress to enforce this limitation is necessarily limited to legislation appropriate to the correction of any discrimination on account of race, color, or condition. The affirmative right to vote in such elections is still dependent upon and secured by the Constitution and laws of the state, the power of the state to prescribe qualification being limited in only one particular. The right of the voter not to be discriminated against at such elections on account of race or color is the only right protected by this amendment, and that right is a very different right from the affirmative right to vote." *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. Rep. 255.

Special elections. — A *Kentucky* statute, entitled "An Act for the benefit of the common schools in Bracken county," which in part "provides that the will of the people, in any given district, shall be ascertained by the submission of the proposition to tax to 'the white qualified voters thereof; * * * and any widow or alien residing in any school district who is a taxpayer, or who has children, within the ages fixed by the common-school laws, to be educated, shall be deemed

a qualified voter,'" does not violate this amendment. "The ascertainment of the will of the people of a district in relation to a tax proposed to be levied for any or all the purposes of the Act is not an election. It is but the action of the agency selected by the legislature to determine when and to what extent the conditional statute shall become operative in that particular district." *Marshall v. Donovan*, (1874) 10 Bush (Ky.) 683.

b. REQUIRING EDUCATIONAL QUALIFICATION. — Where, under the constitution of a state, the electors are required to be able to read a part of the state constitution, or to understand the same and give a reasonable interpretation thereof, it was held that this requirement does not contravene the Fourteenth Amendment to the Constitution of the United States by making discrimination by reason of race, color, or previous condition of servitude, notwithstanding the fact that, under it, more colored persons than white persons are excluded from franchise.

Dixon v. State, (1896) 74 Miss. 271.

c. RIGHT OF WOMEN TO VOTE. — In denying to women the right to vote, a state does not violate the letter or spirit of this amendment.

U. S. v. Anthony, (1873) 11 Blatchf. (U. S.) 200, 24 Fed. Cas. No. 14,459.

d. RIGHT OF INDIANS TO VOTE. — A tribal Indian, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, is not deprived of any rights secured by this amendment by being refused an opportunity to register as a qualified voter.

Elk v. Wilkins, (1884) 112 U. S. 94.

IV. AMENDMENT GIVES RIGHT OF EXEMPTION FROM DISCRIMINATION. — The amendment prevents the states or the United States from giving preference, in the matter of voting, to one citizen of the United States over another on account of race, color, or previous condition of servitude.

U. S. v. Reese, (1875) 92 U. S. 217. See also *U. S. v. Harris*, (1882) 106 U. S. 637.

This amendment relates to the right of citizens of the United States to vote. It does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *Le Grand v. U. S.*, (1882) 12 Fed. Rep. 578.

The election registration laws of South Carolina required that a registration certificate be issued to the voter, the production of which was required at the polls, or his vote was to be rejected; that the voter moving from one place to another in the same precinct must surrender his old and secure a new certificate; that the registration closed four months preceding a general election; and that the applicant for registration must make affidavit setting forth his full name, age, occupation, and residence at the time of the gen-

eral registration in 1882, or at the time thereafter when he was entitled to register, and also give the place or places of his residence since the time when he became entitled to register, which affidavit must be supported by the affidavit of two respectable citizens who were each of the age of twenty-one years on the 30th day of June, 1882, or at the time the applicant became entitled to register. It was held that the evident object that controlled the minds of those who formulated the enactment was how to successfully destroy the greatest number of the ballots of the citizens of African descent, while at the same time to interfere with as few as possible of those of the white race, and that such laws were unconstitutional. *Mills v. Green*, (1895) 67 Fed. Rep. 830. The case was reversed in the Circuit Court of Appeals, *Green v. Mills*, (C. C. A. 1895) 69 Fed. Rep. 852, on other than constitutional grounds, and on appeal to the Supreme Court the appeal was dismissed without costs to either party, on the ground that, as the object of the bill was to secure

a right to vote at an election, and before the appeal was taken from the decree of the Circuit Court of Appeals, the election had been

held, no relief within the scope of the bill could be granted. *Mills v. Green*, (1895) 159 U. S. 651.

Removes from State Law the Words "White Man."—The adoption of this amendment had the effect in law to remove from a state constitution, or render inoperative, a provision which restricted the right of suffrage to the white race.

Neal v. Delaware, (1880) 103 U. S. 389.

"While it is quite true, as was said by this court in *U. S. v. Reese*, (1875) 92 U. S. 214, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding states had not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being para-

mount to the state law, and a part of the state law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women. *Neal v. Delaware*, (1880) 103 U. S. 370. In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right." *Ex p. Yarbrough*, (1884) 110 U. S. 665.

V. COURT OF EQUITY WITHOUT JURISDICTION OVER ELECTION OFFICERS.—

A bill in equity will not lie to compel a board of registrars to enroll upon the voting lists the name of the petitioner, a negro, and of all other qualified members of his race who had applied for registration and were refused.

Giles v. Harris, (1903) 189 U. S. 482. See also *Green v. Mills*, (C. C. A. 1895) 69 Fed. Rep. 852, reversing *Mills v. Green*, (1895)

67 Fed. Rep. 818; *Gowdy v. Green*, (1895) 69 Fed. Rep. 865.

AMENDMENT XV., SECTION 2.

"The Congress shall have power to enforce this article by appropriate legislation."

Must Be Directed Against State, Not Individual, Action.— A statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and an indictment which charges no discrimination on account of race, color, or previous condition of servitude is likewise destitute of support by such amendment.

James v. Bowman, (1903) 190 U. S. 139.

This amendment is not limited to the prohibition of "laws" denying or abridging the elective function. The legislation enforcing it may be corrective of any state action, whether based on state laws authorizing discrimination or not. *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. Rep. 256. But see *U. S. v. Miller*, (1901) 107 Fed. Rep. 915, wherein the court said that while the amendment is primarily aimed at hostile legislation denying or abridging the right of colored men to vote, yet Congress possesses the power to secure the colored man against the deprivation of his right to vote by individuals, where such deprivation occurs on account of race, color, or previous condition of servitude.

Section 5 of the "Enforcement Act" of 1870, providing: "And be it further enacted, that if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented houses, lands, or other property, or by threats of refusing to

renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month nor more than one year, or both, at the discretion of the court," was not within the power of Congress to enact. Instead of being limited in its operation to persons who act or claim to act under prohibited legislation, it provides for the punishment of individuals acting for themselves, irrespective of state laws and in states where there is no prohibited legislation. *U. S. v. Amsden*, (1881) 6 Fed. Rep. 821, wherein the court said that while the first section of the amendment is self-executing, states might venture upon prohibited legislation, and it is competent for Congress to provide for the punishment of persons who, under the pretended authority of such prohibited legislation, deprive or attempt to deprive citizens of the United States of their right to vote. Undoubtedly, Congress may forbid the enforcement of all laws which abridge the rights of citizens to vote on account of their race, etc.; and further provision may be made for the adequate punishment of state or other officers or persons who assume the responsibility of enforcing such laws.

No Power to Control Elections Generally.— It is manifest that no power is conferred on Congress by this section to enact legislation for the regulation and control of elections generally, nor for securing to citizens of the United States the right to vote at all elections.

U. S. v. Miller, (1901) 107 Fed. Rep. 915.

Legislation Must Be Directed to Race Discrimination.— An Act of Congress providing generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without the discrimination prohibited by this amendment, is not such appropriate legislation as was intended by this clause.

U. S. v. Reese, (1875) 92 U. S. 220.

"Notwithstanding the amendment, any state may deny the right of suffrage to citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc. The power of Congress in the premises is limited to the scope and object of the amendment. It can only legislate to enforce the amendment, that is, to secure the right to citizens of the United States to vote in the several states where they reside, without distinction of race, color, or previous condition of servitude." *McKay v. Campbell*, (1870) 2 Abb. (U. S.) 120.

No constitutional statute could be passed by Congress relating to state and municipal elections, except for the purpose of protecting voters from being hindered or prevented from voting on account of their race, color, or former slavery. *U. S. v. Belvin*, (1891) 46 Fed. Rep. 383.

The power of Congress to legislate at all upon the subject of voting at purely state elections is entirely dependent upon this amendment. *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. Rep. 264.

Section 5507, R. S., providing that "every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section," is void, as including within its operation offenses not grounded upon race, color, or previous condition of servitude, and therefore in excess of the power of Congress in respect of state elections. *Lackey v. U. S.*, (C. C. A. 1901) 107 Fed. Rep. 114, reversing *U. S. v. Lackey*, (1900) 99 Fed. Rep. 962. See also *U. S. v. Amsden*, (1881) 6 Fed. Rep. 819.

Section 5508, R. S., which has for its object the punishment of all persons who conspire to prevent the free enjoyment of any right or

privilege secured by the Constitution or laws of Congress, without regard as to whether the persons so conspiring are private individuals or officials exercising the power of the United States or of a state, and which does not draw any distinction between a conspiracy directed against the exercise of the right of suffrage based upon race or color and a conspiracy not so grounded, is not legislation appropriate to the enforcement of this amendment. *Karem v. U. S.*, (C. C. A. 1903) 121 Fed. Rep. 259. But see the title *Civil Rights*, 1 FED. STAT. ANNOT. 802.

May be authorized by article I, section 4.—Though an Act of Congress, sections 2005 and 2006, R. S., may not be within the province of this amendment for wanting apt words limiting discrimination on account of race, color, or previous condition of servitude, it may be authorized by article I, sec. 4. *Brown v. Munford*, (1883) 16 Fed. Rep. 176.

The Act of May 31, 1870, ch. 114, sec. 2, entitled "An Act to enforce the right of citizens of the United States to vote in the several states of the Union, and for other purposes," carried forward into sections 2005 and 2006, R. S., and enacting "that if by or under the authority of the constitution or laws of any state, or the laws of any territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offense * * * be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month, and not more than one year, or both, at the discretion of the court," was held to be valid. *U. S. v. Given*, (1873) 17 Int. Rev. Rec. 189, 195, 25 Fed. Cas. No. 15,210, 15,211. See 8 FED STAT. ANNOT. 317.

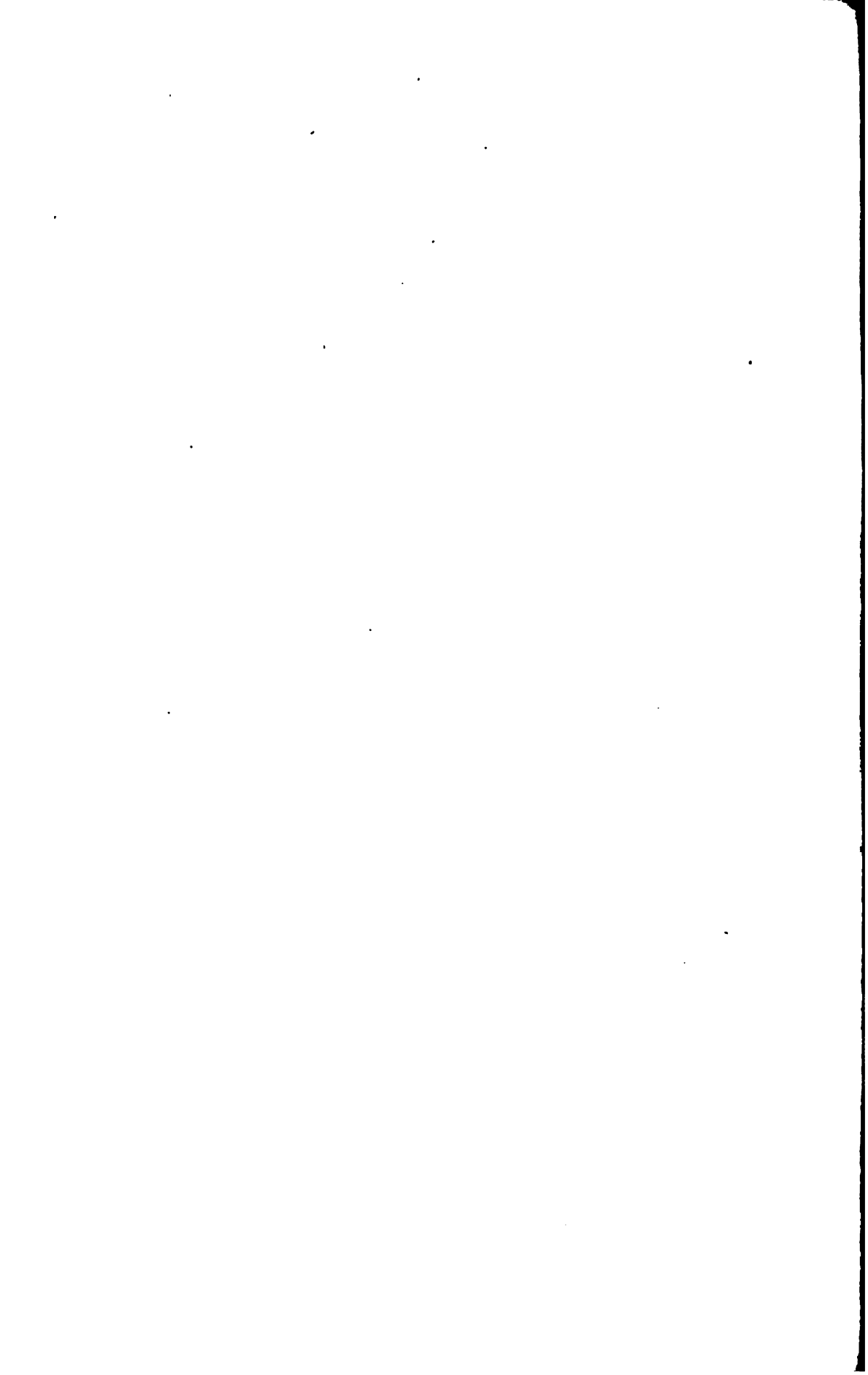


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SUMMARY PROCESS:

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